

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

VIDEO GAMING TECHNOLOGIES, INC.,)
)
Plaintiff,)
)
-VS-) No. 17-CV-454-GKF-JFJ
)
CASTLE HILL STUDIOS, INC., LLC, et al.,)
)
Defendant(s).)

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE GREGORY K. FRIZZELL
UNITED STATES DISTRICT JUDGE
JUNE 11, 2019

REPORTED BY: **BRIAN P. NEIL, RMR-CRR**
United States Court Reporter

A P P E A R A N C E S

Gary M. Rubman and Peter A. Swanson, Attorneys at Law, Covington & Burling, 850 Tenth Street N.W., Washington, DC, 20001, attorneys on behalf of the Plaintiff;

Neil K. Roman, Attorney at Law, Covington & Burling, 620 Eighth Avenue, New York, New York, 10018, attorney on behalf of the Plaintiff;

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Robert C. Gill, Henry A. Platt, and Matthew J. Antonelli, Attorneys at Law, Saul, Ewing, Arnstein & Lehr, 1919 Pennsylvania Avenue N.W., Suite 550, Washington, DC 20006, attorneys on behalf of the Defendants;

Jonathan S. Jacobs, Attorney at Law, Zobrist Law Group, 1900 Arlington Boulevard, Suite B, Charlottesville, Virginia, 22905, attorney on behalf of the Defendants;

James C. Hodges, Attorney at Law, 2622 East 21st Street, Suite 4, Tulsa, Oklahoma, 74114, attorney on behalf of the Defendants.

Tuesday, June 11, 2019

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DEPUTY COURT CLERK: This is Case No.

17-CV-454-GKF-JFJ, Video Gaming Technologies, Inc. v. Castle Hill Studios, LLC, et al. Counsel, please state your appearances for the record.

MR. LUTHEY: Dean Luthey here for the plaintiff.

MR. RUBMAN: Good afternoon. Gary Rubman on behalf of the plaintiff.

MR. ROMAN: Good afternoon, Your Honor. Neil Roman also from Covington & Burling for plaintiff.

MR. SWANSON: Good afternoon, Your Honor. Peter Swanson, Covington, on behalf of plaintiff.

MR. GILL: Good afternoon, Your Honor. Robert Gill from Saul, Ewing, Arnstein & Lehr on behalf of the defendants.

MR. PLATT: Afternoon, Your Honor. Henry Platt on behalf of the defendants.

MR. ANTONELLI: Good afternoon, Your Honor. Matthew Antonelli, also from Saul, Ewing, Arnstein & Lehr, on behalf of the defendants.

MR. HODGES: James Hodges for the defendants, Your Honor.

MR. JACOBS: Hello, Your Honor. Jonathan Jacobs with the Zobrist Law Group on behalf of defendants.

THE COURT: Good afternoon, all. If there's no

1 objection, let's start with the plaintiff's motion for partial
2 at docket 178. You all can assume that the court's familiar
3 with the arguments, and I'd be pleased to hear any additional
4 focus that you'd like to bring to the issues.

5 MR. RUBMAN: Good afternoon, Your Honor. Again,
6 Gary Rubman from Covington & Burling on behalf of Plaintiff
7 VGT. Before I begin, may I hand up some slides to Your Honor?

8 THE COURT: Oh, of course.

9 MR. RUBMAN: And I have a copy for your clerk, if
10 that's okay.

11 THE COURT: Please.

12 MR. RUBMAN: Thank you.

13 THE COURT: All right. I'm told Covington won some
14 little case in front of the Supreme Court yesterday. Is that
15 right?

16 MR. RUBMAN: We did and we're very happy about that.
17 None of us were involved, it was our colleagues, Beth Brinkmann
18 and a few others, and it was a nice win. I think we brought
19 together both sides of the court to a 6-3 decision so that
20 doesn't happen too often. Although it was a patent case.

21 THE COURT: At least it's not advertised very often.
22 I think that focus is always on the 5-4. So --

23 MR. RUBMAN: That is -- that is true. But thank you
24 for acknowledging that.

25 I think we're going to bring up the slide there on the

1 screen as well. And our plan, Your Honor, for this motion is
2 that I was going to handle part of it, which was the portion on
3 the affirmative defenses, and my colleague, Mr. Swanson, was
4 going to handle the portion on the trade secret.

5 *(Discussion held off the record)*

6 MR. RUBMAN: Despite lots of testing -- this worked
7 earlier. So thank you.

8 THE COURT: Off the record.

9 *(Discussion held off the record)*

10 MR. RUBMAN: If we need to, we can just talk from
11 the handouts.

12 THE COURT: That's fine.

13 MR. RUBMAN: For the other slide deck, we do have
14 some sounds. That won't work too well from the paper but we
15 will do our best. My colleague, Neil Roman, will make the
16 sounds himself, if we need to.

17 MR. ROMAN: And they'll sound exactly alike.

18 THE COURT: Well, what we can do is get IT here
19 because I do think some of the sounds would be helpful. Not
20 being --

21 MR. RUBMAN: Oh, we had it.

22 *(Discussion held off the record)*

23 THE COURT: Not being a person with much experience
24 in these things, the two videos that were submitted in
25 connection with some of these motions were helpful to me

1 because I'd been reading about them. But I'm not fairly clear
2 that I hadn't really conceived what those sounds would be like,
3 like the reel resolution sound and that sort of thing. So --

4 MR. RUBMAN: Yes. Understood. And we do have some
5 sound clips to hopefully help Your Honor.

6 *(Discussion held off the record)*

7 MR. RUBMAN: Your Honor, I heard what you said about
8 having read the briefs and having seen all the decisions come
9 out. I know your chambers have been working very hard. So I
10 don't want to stand here and repeat what's in the briefs. The
11 slides, I think, do a good job of summarizing our positions,
12 most of which is reflected -- or all of which is reflected in
13 the briefing back and forth. There are just a couple points I
14 think are important on the issue of the affirmative defenses
15 that I'll just address briefly and then I'm happy to respond to
16 any questions you may have.

17 First, I believe the case law is fairly clear in our
18 minds that these are narrow defenses, and for these defenses to
19 apply, they need to be closely tied to the specific causes of
20 action. Here, we've given three quotes. These are all in the
21 briefs. There's also other cases. But the takeaway from these
22 is that you can't just assert unclean hands or illegality in
23 any case for any reason. It has to be closely tied to the
24 cause of action; in this case, trademark, trade dress, and
25 trade secret.

1 You know, I think in some ways -- perhaps the easiest
2 way to resolve this dispute or this part of the motion is just
3 to look at their disclosures during discovery. Here, we gave a
4 brief timeline of -- we requested information about these
5 affirmative defenses back in January 2018. We never got them.
6 They said that they were going to supplement; they never did.
7 I think that alone is a basis to grant our motion with respect
8 to both illegality and unclean hands.

9 I'll pause on this slide just because it lays out the
10 elements for unclean hands and I don't think there's meaningful
11 dispute on this. I think there was maybe some disagreement at
12 the margins but you'll see here that there's four elements.
13 You know, there's got to be some degree of something improper,
14 whether it's fraud, deceit, unconscionability, or bad faith.
15 And there, there might be a little bit of a disagreement over
16 exactly what's required, but I think the gist is everyone
17 agrees something along those lines is required.

18 Then the next two ones, I think, are the key ones and
19 perhaps the easiest ones to focus on for purposes of this
20 motion. They have to be directly related to the matter at
21 issue and they have to have injured Castle Hill. I think both
22 of those issues, I think, are the most straightforward ways to
23 say that their defenses of unclean hands and illegality are not
24 related to the matters at issue and they do not involve injury
25 to Castle Hill.

1 You know, I'm reluctant to march through our slides
2 here, which again are largely repetitive of the briefing. I
3 think a lot of the arguments come down to those issues so I'm
4 happy to pause there and answer questions or keep going, if
5 it's of help to, Your Honor. I don't want to be unproductive
6 with your time.

7 **THE COURT:** Well, let me cut to the chase here.
8 Because at least in reading the briefs, the court's thought was
9 that the only matter that unclean hands might apply to here
10 because there's not been sufficient evidence to create a
11 genuine issue of fact, for instance, as to whether VGT's
12 products failed to comply with NIGC regs. I don't see that the
13 asserted regulatory noncompliance is related to the conduct
14 here at issue. But to a certain extent, we're sitting here
15 trying to conjure up, like we do so often with pro se habeas
16 corpus defendants, what this possible claim could bear to.

17 As we looked at a recent decision by Judge Brimmer in
18 Colorado, where he addressed the issue of disgorgement of
19 profits, he said that courts must weigh the equities to fashion
20 a remedy that matches the harm, and the considerations of
21 equity that he related had been articulated by the Second
22 Circuit which includes five factors, including plaintiff's
23 unclean hands.

24 So as I sit here right now, we're wondering whether or
25 not insofar as VGT seeks disgorgement of profits, and in so far

1 as the court, if it accepts Judge Brimmer's approach, must
2 weigh the equities to fashion a remedy that matches the harm,
3 the court could consider plaintiff's alleged unclean hands with
4 respect to the trade dress claim.

5 Any thoughts in that regard?

6 MR. RUBMAN: Sure. And in particular, with respect
7 to the regulatory theory? Is that the question? That's the
8 way I understood the question.

9 THE COURT: Well, frankly, we thought as opposed to
10 regulatory. Because I don't see anything here, any evidence,
11 of noncompliance with NIGC technical standards at all, let
12 alone related to the conduct at issue. I was looking at the
13 allegations that recent changes to trade dress increase the
14 likelihood of confusion. And, of course, the first question
15 that begged itself is, all right, at what point do I judge
16 trade dress?

17 But to the extent that you're seeking equity here in
18 terms of disgorgement, don't I have to look at continuing
19 conduct? And to the extent that they claim that you're now
20 adjusting your trade dress to increase the confusion more to
21 look like CH appearances, don't I have to consider the alleged
22 changes that occurred, what did they say, August of 2018, or
23 something like that, in your trade dress? That could
24 potentially be unclean hands. As I say, it's not my job to
25 make arguments for the defendant.

1 MR. RUBMAN: Right.

2 THE COURT: But we're trying to conceive of how
3 unclean hands could possibly be a defense here. Go ahead.

4 MR. RUBMAN: Understood. And thank you. The short
5 answer is no but I'll expand on that a little bit.

6 THE COURT: Uh-huh.

7 MR. RUBMAN: First, this is a new theory. And I
8 mentioned --

9 THE COURT: Well, it was raised in -- unclean hands
10 was raised generally. But you're saying new theory to the
11 extent that they claim that there have been changes to trade
12 dress?

13 MR. RUBMAN: Exactly.

14 THE COURT: Okay.

15 MR. RUBMAN: The first time we ever -- so in our
16 motion, we tried to predict the ones that we thought they were
17 going to raise and we got three out of four, the other three.
18 This one is the one we didn't mention because it was never
19 disclosed. They didn't ever mention this, they never asked
20 about this in depositions, as far as I know, they didn't serve an
21 interrogatory response at any time. This is the interrogatory
22 that we served back in January and never got a response. The
23 only response they said for any of these defenses that are
24 relevant they referred to laches and then they didn't say
25 anything else. And then there's an e-mail from Castle Hill's

1 counsel saying that we will be supplementing these. That was
2 included in the record. I can give you the cite, if you'd
3 like, but then they never did.

4 And so then the next thing we heard -- we file this
5 motion. In their opposition brief a few months -- or it worked
6 out to be a few months after the e-mail -- we hear about this
7 change theory, this game change theory. That's the first time
8 we ever heard about it.

9 So there's been very little, if any -- essentially no
10 discovery on this, no ability to develop it. All we have from
11 them is a two-page -- I believe it's two-page -- affidavit from
12 one of their employees, a gentleman named Dan Fulton. Doesn't
13 include anything about dates. Doesn't identify any games at
14 all. Doesn't tie it to any of the games at issue in this case.
15 Includes very generalized allegations, some of which we don't
16 even fully understand. You know, so that's kind of a starting
17 point.

18 Second point is, I mean, really what they're arguing
19 here is that VGT, who's been the market leader who filed this
20 case because it's concerned about consumer confusion, for some
21 reason had an incentive to make their games look more like the
22 defendants' games that they're accusing of confusion. And
23 that's, in our minds, nonsensical, they wouldn't do that.
24 They've invested the time and effort in this case because they
25 want to avoid confusion, not create further confusion. So

1 that's another problem with this theory.

2 But without more information, without any specific
3 testimony at this point, they don't have anything to create a
4 triable issue with other than an unsubstantiated declaration
5 that came late in the game with no support in it, no citations,
6 no exhibits. There's not a triable issue of fact on this, and
7 it's not even clear whether they're even referring to any games
8 at issue in this case.

9 THE COURT: Well, they were talking about the red
10 screen and talking about -- this is from memory -- but they're
11 talking about a tape, I guess, that would make your red screen
12 look more like theirs, all right, as I recall.

13 MR. RUBMAN: That is one of them, yeah.

14 THE COURT: So they were specific in that regard;
15 right?

16 MR. RUBMAN: At that level but not with respect to
17 what games.

18 THE COURT: I see.

19 MR. RUBMAN: Are these referring to three-reel
20 mechanical games; for example, most of the ones at issue in
21 this case; or next-generation video screen games, which, you
22 know, our client does continue to develop, and those are not at
23 issue in this case. There's not anything in the record to say
24 what they're even referring to. And so it feels to me like a
25 last-ditch effort to save these affirmative defenses. And, you

1 know, from what we've seen right now, we don't even know fully
2 how to respond to it because we don't even know what they're
3 exactly referring to.

4 The other point here -- and this is the last point on
5 this slide -- is that there's also a certain amount of irony
6 here. They're referring to very minor changes that they allege
7 have happened, who knows when, and saying that those caused
8 confusion, those make things look more similar -- they make our
9 games look more similar to theirs. When you take a step back
10 and think about our allegations against them, they're dwarfed
11 by comparison. And so, you know, for whatever that's worth,
12 it's a little bit of -- that's why I say this is a little bit
13 of a Hail Mary. There's no there there in my mind to create a
14 triable issue at this late stage of the game.

15 THE COURT: Well, it's an interesting argument. I
16 mean, simplistically, as I read it, they were accusing you
17 after you accused them of using the red screen of actually
18 adopting their improvements on your red screen.

19 MR. RUBMAN: Yeah.

20 THE COURT: I'm not sure that they can't do that
21 legally, I mean, to the extent that you're seeking equity;
22 right? I mean, you're seeking disgorgement of profits; right?

23 MR. RUBMAN: That, we are. But for it to come into
24 the case as part of an unclean hands defense, they have to meet
25 the elements of an unclean hands defense, one of which is it

1 relates to our cause of action. I hear what you're saying.
2 Second is injury to -- or the third is injury to Castle Hill.
3 You know, if they truly believe they're injured here, they're
4 always free to file a lawsuit claiming that we're somehow
5 infringing their rights.

6 THE COURT: But they're not claiming that. They're
7 just raising it as an affirmative defense.

8 MR. RUBMAN: But it has to be harm to them, and I
9 haven't seen any harm to them that they've articulated as a
10 further problem here.

11 THE COURT: As an affirmative defense, they have to
12 show harm to them?

13 MR. RUBMAN: Yes. I've put on the screen the
14 elements that I don't believe there's much dispute over. That
15 has to be something we're guilty of, fraud, deceit,
16 unconscionability, bad faith; number two, directly related to
17 the matter at issue; three, that injured Castle Hill. That's
18 what I meant by harm to them, injury to Castle Hill that
19 affects the balance of equities between Castle Hill and VGT.

20 I think that given what's in the record at this late
21 stage of the game and their failures to disclose this theory
22 earlier -- and I know that they say that they couldn't disclose
23 it earlier because of something with timing of depositions --
24 but even putting that aside, I don't believe that they can show
25 a triable issue of fact with respect to all four of these

1 elements on that theory.

2 THE COURT: All right. Unclean hands. Illegality?

3 MR. RUBMAN: Sure. Again, I don't want to repeat
4 things that you've already read, and I think some of this is
5 similar to the discussion we just had.

6 THE COURT: Right.

7 MR. RUBMAN: My understanding is their illegality
8 defense, again, they've never really articulated in a discovery
9 response, but my understanding from their briefing is that it
10 focuses on the regulatory issue. I heard what you said on that
11 so I don't want to belabor the point.

12 But on the screen, we've shown the elements which,
13 again, I don't believe are in dispute, but there has to be an
14 indisputable violation of the statute. Again, has to relate --
15 there has to be a nexus between the use of the mark and the
16 violation and it has to be a material violation. We might
17 disagree over exactly how those are applied, but those are the
18 three elements.

19 I think for all the reasons you articulated earlier, we
20 don't believe they can prove any of these. But in particular,
21 indisputable violation of the statute, I think the evidence in
22 the record is just to the contrary.

23 THE COURT: All right. Thank you very much.

24 MR. RUBMAN: Do you want to hear on the other issues
25 now from us or go and back forth on this one?

1 THE COURT: Let's go back and forth because they're
2 really different. Let's respond to the unclean hands and
3 illegality affirmative defenses.

4 MR. GILL: I will, Your Honor.

5 THE COURT: Yes, sir. Mr. Gill.

6 MR. GILL: Thank you, Your Honor. There are several
7 things that I would like to cover in response to Mr. Rubman's
8 arguments. The first, I think, is based on your comment that
9 you made a few minutes ago about not seeing a basis for the
10 illegality defense and I think we did address this in our
11 brief.

12 But the NIGC regulations that addressed the
13 grandfathering status that we raised is set forth at Section
14 547.5. And to put a sharp point on it, the regulations require
15 that in order for a party to have games that qualify as
16 grandfathered, those games needed to have been manufactured in
17 their entirety by no later than November 10 of 2018. So the
18 evidence that we cited in our brief is evidence that we
19 obtained from the plaintiff in discovery, which shows the
20 significant placement of games by the plaintiff in commerce
21 that were manufactured after that cutoff date of November 10 of
22 2008. So it is that which is the basis for our illegality
23 defense; it's based directly on the NIGC regulations.

24 And so we have a fact, which we have, I think, pled in
25 our papers with specificity, that show a substantial number of

1 VGT games did not comply with the regulations. Yet, the
2 plaintiff is claiming intellectual property rights based on its
3 games. The regulations also require -- and one of their
4 overall overarching purposes of the regulations is to provide
5 for fairness in the gaming process. That's set forth at
6 Section 547.4(a) in the NIGC regulations.

7 So the cases that address the illegality defense
8 require that -- well, they provide two opportunities for use of
9 the defense. The first is for something that harms the public.
10 And based on the NIGC regulations and the stated purpose of
11 protecting the gaming public, we think we have fairly
12 implicated that factor that this defense is something that
13 relates to potential injury to the public --

14 THE COURT: But has a court or government of
15 competent jurisdiction previously made a finding on
16 noncompliance in this regard?

17 MR. GILL: No, no, Your Honor. And I'm not so
18 contending as I stand here. But I will also tell you that I
19 don't think it is a prerequisite for me to assert as a defense
20 illegal conduct that it have been adjudicated by another court.
21 I think it's fair and proper for me to assert that as a defense
22 here without having had a prior adjudication.

23 THE COURT: How would you address then the argument
24 that the Trademark Trial and Appeal Board in this *General Mills*
25 case states that the better practice in trying to determine

1 whether a use of a mark is lawful under the one or more of the
2 myriad regulatory acts is to hold a use in commerce unlawful
3 only when the issue of compliance has previously been
4 determined by a court or a government agency having competent
5 jurisdiction?

6 MR. GILL: I'm familiar with the precedent that was
7 cited. First of all, I don't think it's binding on Your Honor.
8 And if we take into context what it is that I'm trying to do
9 here, I have not asserted a civil claim against VGT for the
10 recovery of monies based on illegal conduct. What I'm doing is
11 I'm a defendant who's been hailed into court on various
12 claims -- intellectual property claims, trademark claims, trade
13 dress claims, trade secret claims -- and I'm wanting to use
14 this only as a defense.

15 And so what I don't want is I don't want you to be
16 unfairly limited in your consideration of this case as the
17 trier of fact, because as you know there's no longer any jury
18 in this case, and you have the right to consider this conduct
19 if there's an ultimate determination of liability in connection
20 with a determination of a fair and appropriate damage.

21 I think Your Honor put your finger right on it when you
22 were talking about the opinion from Judge Brimmer. That's
23 exactly what we want. We don't want you to be bound with your
24 hands behind your back and be unable to consider this conduct
25 as it relates to the plaintiff and our defense. We think it's

1 a fair consideration for you to take into account.

2 I'm not asking for a judgment against VGT. I'm not
3 asking for money damages against VGT. But it is fair for me to
4 raise this as a defense in the case. As the numerous papers in
5 this case allege, not only is this an issue, because one of the
6 openings for asserting this defense is it's something that
7 affects the public -- and as I've indicated to you a few
8 minutes ago, this is something that implicates the public based
9 on the fairness and the purpose behind the regulations -- but
10 it also affects us. We are a competitor. We have to compete
11 against them in this marketplace. This allegation is that we
12 are competing against them including, among other things, with
13 games that are not properly and legally in the marketplace and
14 we don't think that's fair.

15 How does that tie into certain of the claims in the
16 case? Well, you're going to hear some arguments today about
17 secondary meaning, I expect, and how secondary meaning relates
18 to the claims of the defenses in this case. Well, if you look
19 at the plaintiff's brief in response to our motion for summary
20 judgment, they have allegations in there about how they have
21 proven secondary meaning.

22 Well, there's two ways to prove secondary meaning. You
23 can have direct evidence of secondary meaning so you might have
24 a survey that addresses it. The survey in this case, which
25 Your Honor already ruled on, by Dr. Wind did not address

1 secondary meaning. But there's no other survey to address
2 secondary meaning and there's no other consumer direct evidence
3 of secondary meaning. So what we don't have in this case is,
4 we don't have direct evidence of secondary meaning. So that
5 puts the plaintiff then in a position of trying to establish
6 secondary meaning through circumstantial evidence and that's
7 what they're trying to do. So in their briefs, for example,
8 they recite how they have [REDACTED] in revenue from the prior
9 ten years of operations and they recount how they've expended
10 [REDACTED] in advertisement.

11 Well, you're going to hear from us that those
12 generalized statements about either revenue that was received
13 or advertising expenditures that were made are not sufficient
14 to be able to connect the dots and show secondary meaning.
15 Because if you look to the Tenth Circuit's commands to us from
16 the *Water Pik* decision, the Tenth Circuit said to us -- and
17 this is consistent with the holdings in other circuits as well,
18 it's not an aberration -- that in order to show secondary
19 meaning, you have to show a nexus between the advertising
20 expenditures and the particular trademark or trade dress at
21 issue. And they don't do that. So what they've got is they're
22 saying, hey, we spent [REDACTED] in advertising as a company
23 and we received [REDACTED] in revenue as company but they
24 don't tie it to specific things.

25 Well, one of my problems is, their secondary meaning

1 evidence is related to illegality because they've received
2 revenue from these illegal games and that illegal revenue is
3 part of that [REDACTED] worth of revenue and those advertising
4 expenditures, I think, relate to advertising that would cover
5 those illegal games as well. So the illegality defense is
6 something that is tied to both the public component and as to
7 Castle Hill. That's how it's relevant to this case. And we
8 want you in fairness to be able to consider it.

9 Now, I also would like to just factually correct a
10 misstatement. Mr. Rubman indicated that the plaintiff had
11 asked us -- asked Castle Hill about affirmative defenses back
12 in January of 2018 and we didn't respond. Illegality and
13 unclean hands were not asserted as a defense in January of
14 2018. We didn't assert those defenses until we responded to
15 the plaintiff's first amended complaint which was filed in
16 July, mid-July, of 2018. So when we filed our responsive
17 pleading to the first amended complaint, that's when we
18 asserted those defenses. That was -- when that complaint was
19 filed, we were approximately two weeks out from the close of
20 discovery. So that's the chronological progression with regard
21 to the defendants' assertion of those defenses when discovery
22 closed.

23 Now, what we don't have is, we didn't have any requests
24 from the plaintiff; for example, under Rule 56, to take any
25 further depositions related to this issue. So the plaintiff

1 did not pursue that. But with respect to the defense, the
2 defense was timely asserted in response to the first amended
3 complaint. It wasn't pending earlier in the case.

4 I'd like to address also the colloquy between you and
5 Mr. Rubman about the issue that you asked about, Judge, which
6 was changes that were made to the game late in the process, and
7 this is something that we also addressed in our briefs.

8 The problem that we had is that, for example, the
9 changes that were made to the red screens to make the
10 plaintiff's red screen feature more like Castle Hill's red
11 screen feature, to the best we can tell, that change was not
12 implemented by the plaintiff in the marketplace until August of
13 2018 after the close of discovery in this case.

14 Did we ask about it in discovery? Yes, we did. And we
15 have the testimony, which we cited in our papers, from the
16 president of VGT, Mr. Jay Seviigny, who said we have not
17 previously had the technology in order to be able to implement
18 that change to our red screen feature because their feature
19 previously was basically having a red film present itself over
20 the screen. They didn't have the technology to be able to do a
21 red screen feature that was more sophisticated than that.
22 That's something that Castle Hill has always done with its
23 machines and they have since implemented that. So apparently
24 they have made the technological enhancements or adjustments to
25 their machines in order to be able to do this, and that wasn't

1 implemented, as near as we can tell, until August of 2018 so it
2 didn't fall within the discovery period.

3 So we didn't have an opportunity to address this in the
4 course of discovery, but that doesn't mean that it's unfair for
5 us to be able to address this issue because it does address the
6 issue of confusion in the marketplace which is directly
7 relevant to the plaintiff's claims against us at the time this
8 case goes to trial.

9 So we think, again, we are not pursuing a monetary
10 claim based on this. We are only raising this as a defense to
11 the claims that the plaintiff has made against us in order to
12 be able to defend against these accusations. So that's where
13 the record leaves us.

14 Now, I also want to just make clear for the record the
15 plaintiff's motion for partial summary judgment, in addition to
16 the trade secret allegations, addresses, as Your Honor knows,
17 these two defenses of unclean hands and illegality. That part
18 of their motion is related closely to a motion in limine they
19 filed, which is technically not before the court today, where
20 they also seek to exclude at trial evidence of unclean hands
21 and illegality. But that motion actually goes further and
22 seeks to exclude other evidence. Basically, it seeks to
23 exclude evidence and argument in support of a defense theory of
24 the case. It's not an affirmative defense; it's just a theory
25 of defense of the case.

1 I don't understand that to be something that's up on
2 this motion today. To the extent Your Honor wants to address
3 it, I'm happy to do that. But I want to make clear for the
4 record that by not addressing it, I'm not ceding any ground on
5 that, I'm not abandoning any opposition to that motion, but
6 that's not something that Mr. Rubman addressed in his remarks
7 to Your Honor either. I just wanted to make clear on the
8 record that that's not something we understood to be up today.

9 THE COURT: So how do you respond to the court's
10 impression that at most the unclean hands affirmative defense
11 would apply to trade dress?

12 MR. GILL: No. I think it goes beyond just trade
13 dress. The change to the games of the -- for example, the red
14 screen feature, that's a trade dress issue, but the illegality
15 and unclean hands defense more broadly -- I mean, the law
16 supports that defense for other claims --

17 THE COURT: I thought we were talking about two
18 separate affirmative defenses, unclean hands on the one and
19 illegality on the other.

20 MR. GILL: That's true. That's true. But on the
21 illegality issue --

22 THE COURT: On the unclean hands affirmative
23 defense.

24 MR. GILL: I think the unclean -- first of all, I
25 think they're related. I think those two defenses are somewhat

1 related. But I think that for the -- well, this actually
2 implicates that other motion that I just mentioned to you. So,
3 for example, I think some of the subjects of that other motion
4 would be more fairly categorized as unclean hands evidence
5 rather than illegality evidence. To me, the illegality
6 evidence is based on the regulatory scheme that I've already
7 addressed and other conduct relates more to the unclean hands
8 defense. I think unclean hands defense relates to the trade
9 dress claim based on these features. I think the illegal
10 defense relates to all the claims because all the claims
11 contain a monetary component and seek, you know, disgorgement
12 of the defendants' profits. So I think the illegality defense
13 covers all of the claims.

14 THE COURT: All right. Anything else on affirmative
15 defenses?

16 MR. GILL: Not on those two defenses, I don't think,
17 Your Honor, unless Your Honor has any further questions for me.

18 THE COURT: No, sir. Oh, sorry. I do.

19 MR. GILL: Okay.

20 THE COURT: What is the exact nature of the alleged
21 noncompliance, the regulatory noncompliance?

22 MR. GILL: The exact nature of the regulatory
23 noncompliance is the placing into commerce of games that were
24 manufactured after the cutoff date in the regulations of
25 November 10 of 2008. Because those regulations, if you look

1 not just at the regulations themselves but also the comments
2 that interpret those regulations, made very clear that that
3 meant that that cutoff date of November 10 of 2008, that's for
4 any component part of those machines. That would include the
5 cabinet, that would include the software, that would include
6 anything else, which is all part of what's described as the
7 gaming system under the NIGC regulations.

8 So in order to comply, all of those parts needed to
9 have been manufactured and "off the assembly line" by that date
10 in 2008. If they were already manufactured but may not have
11 yet been assembled, then that's something that could still
12 comply with the regulations. But for things manufactured after
13 that date, they just don't comply and those games are illegal.

14 THE COURT: So with regard to the software that you
15 say is non compliant, what specifically is the allegedly
16 noncompliant software?

17 MR. GILL: It was the software that was in place in
18 the machines before the 2008 deadline.

19 THE COURT: And specifically what is that?

20 MR. GILL: Well, it's the entirety of the software
21 that was used to run the system. So part of the intent of the
22 regulations that we were talking about earlier with regard to
23 protecting the gaming public in fairness in gaming was
24 security-related concerns. The NIGC was concerned that older
25 gaming systems, based on older software, were not secure enough

1 and they wanted to update the software in order to address
2 those security concerns. That was, as I understand it, the
3 genesis of the concern about the software.

4 MR. PLATT: Your Honor?

5 THE COURT: Yes, sir.

6 MR. PLATT: If I may just interject. To answer your
7 question directly, [REDACTED] So it's VGT
8 [REDACTED], which is not compliant, versus VGT [REDACTED]. Sorry
9 to interrupt.

10 THE COURT: Thank you. Now, so that would be part
11 of -- with regard to software, VGT [REDACTED], that would be part
12 of VGT's asserted trade secret?

13 MR. GILL: Yes.

14 THE COURT: All right. So specifically, how does
15 VGT's alleged regulatory noncompliance then result in
16 unfairness or dishonesty to the public?

17 MR. GILL: Well, only in the sense that it
18 implicates the overarching purpose of the NIGC regulations to
19 provide for fairness in gaming and to protect the public. So
20 these were, you know, a modernization and security-related
21 concern in an overarching manner, and the concern was the older
22 machines didn't satisfy the current requirements for that.

23 THE COURT: And then how do you allege that that
24 alleged regulatory noncompliance resulted in unfairness to you,
25 to Castle Hill?

1 MR. GILL: Well --

2 THE COURT: Because you had to comply and they
3 didn't?

4 MR. GILL: Well, first of all, that's a, first of
5 all, true point and it's an interesting point. Because, you
6 know, earlier in this case the plaintiff had alleged that we
7 had copied their source code which turned out to not be true
8 and turned out to be an allegation that they dropped. We had
9 actually purchased most of our software as an over-the --
10 off-the-shelf, over-the-counter purchase and then modified it
11 to suit our needs because it was actually written for a
12 different type of game and we modified it for Class II games.
13 So our software is very different and more modern in nature.

14 But we have to comply -- we had to go through the cost
15 and expense to comply with those regulations which VGT didn't.
16 VGT has had the ability to enjoy revenue from those games that
17 weren't properly in the market to begin with, and VGT seems to
18 be relying on those games and the revenue from those games and
19 the advertising expenditures expended for those games in
20 support of its secondary meaning argument. So we think that's
21 the nexus to Castle Hill.

22 THE COURT: Okay. Anything else?

23 MR. GILL: Not unless you have any further
24 questions, Your Honor.

25 THE COURT: No. I think I need to give Mr. Rubman

1 an opportunity to reply on that.

2 MR. RUBMAN: Thank you, Your Honor. I'll be very,
3 very brief and there were only a few points that I was
4 intending to respond to unless you had questions. I wasn't
5 going to respond to the whole secondary meaning thing. I think
6 that's probably more relevant to the next -- to the other
7 motions.

8 THE COURT: Yes.

9 MR. RUBMAN: But, first, with respect to the timing
10 of the affirmative defenses, I perhaps didn't hear correctly.
11 But in Exhibit W in the briefing, which is Castle Hill's
12 response to our interrogatories, those are dated February 20th,
13 2018, they talked about unclean hands there, or at least they
14 acknowledged that there was an unclean hands affirmative
15 defense already in the case at that point. This is on page 4
16 of those responses under the third affirmative defense. They
17 say "Plaintiff's claims are barred or reduced by the doctrines
18 of estoppel, laches, unclean hands," and it goes on, "consent,
19 acquiescence, and/or waiver."

20 So it already was in the case, at least at the level
21 that some parties tend to assert affirmative defenses, where
22 they throw in -- I think they had 20 or 30 affirmative
23 defenses. We said tell us the reasons for those and that was
24 the interrogatory. So as early as February, we already had a
25 response in which they didn't tell us the response. The only

1 thing that they said in that response was about laches. So on
2 the issue of timing, I think that's something I just wanted to
3 note.

4 The only other point I was planning to make was on the
5 issue of -- you know, I didn't hear them say exactly what
6 regulations they claim our software violates. I think they are
7 suggesting we violate maybe -- I don't know. But they didn't,
8 I don't think, answered your question. There is a bulletin
9 from the NIGC that we quoted in our reply brief -- this is on
10 page 4 and I think it starts at the bottom of page 3 -- where
11 it addresses this issue about adding a new game or new cabinet
12 to a system that's already in place that's grandfathered.

13 And so our understanding is that this addresses the
14 issue quite clearly and confirming there is no violation, which
15 is consistent with the fact that these games have repeatedly
16 been certified by the testing labs and the Indian gaming
17 regulatory bodies, that we don't think that there's a violation
18 there, and that's confirmed by the bulletin by they actually
19 cited in your brief but not this portion. So we put a block
20 quote. It's on page 4. It's Exhibit 28 at page 7 of that
21 exhibit which we think is helpful on that point.

22 And unless you have questions, I don't have anything
23 further I wanted to respond to.

24 THE COURT: I don't believe so. Thank you very
25 much.

1 MR. RUBMAN: Thank you.

2 THE COURT: Just one second.

3 *(Discussion held off the record)*

4 MR. SWANSON: Good afternoon, Your Honor. Peter
5 Swanson again.

6 THE COURT: Good afternoon.

7 MR. SWANSON: And would it be possible to pull up
8 the computer screen?

9 Okay. Your Honor, I will be addressing the second
10 issue in our motion for partial summary judgment, the trade
11 secret claim with respect to the bingo card. We're now getting
12 into -- I think we've been talking about maybe some
13 confidential. We're now getting into some pretty sensitive
14 confidential issues, and I don't see any members of the public
15 in here, but certainly we would ask the court to seal the
16 courtroom if anyone from the public comes in.

17 THE COURT: I doubt that anyone's going to come in
18 but we'll --

19 MR. SWANSON: They're probably not --

20 THE COURT: But if that occurs, just bring it to my
21 attention. Go ahead.

22 MR. SWANSON: Thank you, Your Honor. And, again,
23 I'm happy to address any issues or questions that are of
24 interest to Your Honor. Otherwise, I can walk through some of
25 the big-picture points and I'll try to keep this brief.

1 I think the first point is this is a motion for partial
2 summary judgment that we're bringing on one particular act of
3 misappropriation by Castle Hill. There are -- as you may have
4 seen in the briefs, there are many other instances of
5 misappropriation of trade secrets and confidential information
6 which we intend to prove at trial. But on this particular
7 issue, we believe the evidence is so one-sided, and, in fact,
8 undisputed, that summary judgment was warranted.

9 THE COURT: Well, let me ask two overarching
10 questions then in that regard, or more.

11 First of all, you're really focused on both the bingo
12 card generation algorithm and the uniqueness testing algorithm,
13 which, as I understand it from my reading of these various
14 declarations, are really two separate things; correct?

15 MR. SWANSON: That's correct, Your Honor.

16 THE COURT: So when you say one thing, you're
17 talking about both of those algorithms together?

18 MR. SWANSON: So they are two different algorithms.
19 They're closely related.

20 THE COURT: Yes.

21 MR. SWANSON: And I can explain how they relate to
22 one another.

23 THE COURT: Yes. I think those long declarations,
24 I've spent some time trying to understand them and so I've got
25 a rudimentary understanding.

1 So let me just ask then: Some of these elements do
2 seem to favor VGT, but in our reading of the briefs it appears
3 to us that perhaps there are genuine issues of material fact
4 with respect to some of these elements. Number one, the
5 existence of a trade secret; number two, whether or not Castle
6 Hill has raised a genuine issue of material fact regarding the
7 element of reasonable efforts to maintain secrecy; and then
8 finally, whether Castle Hill has raised a reasonable -- a
9 genuine issue of material fact as to the similarity between
10 VGT's algorithm and Castle Hill's algorithm. Although, my
11 understanding from, once again, on a very rudimentary basis is
12 once Castle Hill had attempted to create its own algorithm with
13 regard to bingo card generation, it discarded that and then
14 adopted VGT's.

15 So those three things -- well, then and a fourth thing.
16 Is it possible under Virginia law that the confidentiality
17 agreement with Mr. Suggs and others is unenforceable due to
18 indefinite duration? Specifically, I was looking here earlier
19 today on these more recent -- or at the more recent decisions.
20 I think it was in the Western District of Virginia and one of
21 the other districts, maybe Eastern District --

22 **MR. SWANSON:** Eastern.

23 **THE COURT:** -- 2017, 2018 decisions, and one
24 referenced a Fourth Circuit affirmance of one of those
25 decisions saying that the confidentiality agreement -- or such

1 a confidentiality agreement is unenforceable if it is of
2 indefinite duration.

3 MR. SWANSON: Okay. Happy to address all of those
4 issues.

5 THE COURT: Yes, sir.

6 MR. SWANSON: So maybe we can start with the
7 reasonable efforts to maintain secrecy, which comes first at
8 least in our presentation.

9 I think in this slide we've listed the material
10 undisputed facts that entitle VGT to judgment on this element.
11 The algorithm is implemented in source code, which is
12 maintained in a password-protected repository; the documents
13 that describe the algorithm are marked as confidential; the
14 testing lab's employees who have access to it are bound by
15 confidentiality agreements. All of those are undisputed. And
16 both Mr. Suggs, a Castle Hill employee and former VGT employee,
17 and our expert, Mr. Friedman, agreed VGT took reasonable
18 efforts, and Castle Hill's expert, Mr. Zeidman, does not
19 provide a rebuttal opinion on that.

20 I think the main argument that Castle Hill raises on
21 this element is something about the disclosure of operator
22 manuals. They cite testimony of one VGT witness.

23 THE COURT: Right.

24 MR. SWANSON: The operator manuals are given to
25 customers and Castle Hill says, and not all customers have

1 confidentiality obligations.

2 THE COURT: Right.

3 MR. SWANSON: And the issue with that argument is
4 that they've not shown the algorithm is contained in those
5 manuals. Operator manuals are higher level manuals that don't
6 describe the inner workings of the system and they don't
7 describe the bingo card algorithm. We produced the operator
8 manuals in discovery and so they have them, and they've not
9 come forward and actually submitted them as part of the record
10 on summary judgment. So there's no genuine dispute as to that
11 one.

12 THE COURT: Well, it would be highly unusual for the
13 algorithms to be in operator manuals.

14 MR. SWANSON: Exactly. And the customers don't need
15 to know how the bingo cards are generated.

16 THE COURT: Right.

17 MR. SWANSON: And so the operator manuals are more
18 at the level of, you know, how do you run the software, how do
19 you, you know, maintain and service the machines, things like
20 that.

21 THE COURT: So it's your position then, without
22 showing that the algorithms themselves are contained in those
23 operator manuals, Castle Hill has failed to raise a genuine
24 issue of material fact?

25 MR. SWANSON: That's correct, Your Honor.

1 THE COURT: Okay.

2 MR. SWANSON: So moving on then to the not generally
3 known or readily ascertainable, so, you know, is this a trade
4 secret or, you know, is this something that's generally known,
5 as Castle Hill says, the first point on this one is, I don't
6 believe there's a dispute that it's not readily ascertainable,
7 which would be if you're playing the games can you figure out
8 how the bingo cards are generated? I don't understand there to
9 be a dispute that that's not possible.

10 We also believe there's no genuine dispute as to
11 whether it's generally known. Castle Hill does not dispute
12 that Class II companies typically do not disclose their
13 algorithms. We've proffered evidence that VGT has not
14 disclosed this algorithm. They have not come forward with any
15 evidence showing that it's been publicly disclosed anywhere.
16 And, again, Mr. Suggs agreed it's not generally known and our
17 expert agrees that it's not generally known.

18 THE COURT: He does, however, say that -- and I know
19 this is self-serving, but he's saying it's simplistic enough in
20 approach that others with experience in client-server
21 architecture would think of the approach.

22 MR. SWANSON: Yes, Your Honor. And the problem with
23 that is that's not the relevant test in trade secret law.
24 That's more of a patent law issue, is something obvious. This
25 is an argument, I think, that comes up in both sets of briefs

1 or motions.

2 But the Tenth Circuit in a couple of cases -- I think
3 both are applying Colorado law -- but this is a generally
4 applicable principle to trade secret law. The Tenth Circuit's
5 made clear that obviousness and novelty are not the requisites
6 under trade secret law. Trade secret exists to protect, you
7 know, hard work, discovery, things that would be valuable and
8 are kept secret and that would require time and effort to
9 compile. They don't require the same level of invention as
10 patent law does.

11 So while we disagree with them, we think this actually
12 is a pretty unique, not obvious, and complex solution. We
13 think that's not a germane dispute to whether it's a trade
14 secret.

15 THE COURT: I believe the argument in response is
16 that -- citing a U.S. Supreme Court case -- is that secrecy in
17 the context of trade secrets implies at least minimal novelty.
18 So although novelty is a patent law concept, it's relevant
19 here. Your response?

20 MR. SWANSON: So the *Rivendell* case from the Tenth
21 Circuit that's cited, I believe, in our opposition to Castle
22 Hill's motion -- it's 28 F.3d 1042 -- that case makes clear,
23 along with other authorities that we've cited in both briefs,
24 that novelty is not a prerequisite for something to be a trade
25 secret.

1 I think -- and I'm not familiar with the exact context
2 of that statement in the Supreme Court case that Your Honor
3 mentioned. But, I mean, certainly if something has been done
4 before and has been publicized, then that means it's generally
5 known. And so in that sense, if something's, you know, not
6 novel and it's so kind of widely known, then it's not going to
7 be a trade secret. So that may be the context in which that
8 statement was made, but otherwise novelty is not a requirement.

9 And I guess the other point I would make as a factual
10 matter, a Castle Hill has not come forward with evidence that
11 this is not novel. I believe Mr. Suggs' testimony that Your
12 Honor referred to, I don't think he says someone else has
13 actually done this before. I think he just says, I think it's
14 simple, I think someone could do it, I think someone else could
15 re-create it, but he doesn't say that it's actually been done
16 before.

17 Okay. I think Your Honor also asked about similarity,
18 and there's also no dispute on this one. I think the best
19 place to look for similarity is Castle Hill's response to our
20 statement of facts, paragraph 36 through 43. That's where we
21 -- those paragraphs go through the [REDACTED] steps of the algorithm,
22 the [REDACTED] elements, and they didn't dispute any of those facts
23 that their algorithm has the exact same [REDACTED] elements as the VGT
24 algorithm as we've set forth in our motion. And in our view,
25 Your Honor, that's dispositive.

1 The issues that their expert raised, there were a
2 couple of issues about the specific implementation details.
3 That goes beyond the [REDACTED] elements that make up the trade secret
4 as we've defined it, and so it's irrelevant whether they have
5 those different implementation details.

6 You know, for instance, I think one of them has to do
7 with, are there 24 spaces on the bingo card or 25 spaces, which
8 if you have the free space or not. We're not claiming that 25
9 spaces or 24 spaces is part of the trade secret. So the fact
10 that they have a different number is not material.

11 THE COURT: The last thing I raised was this -- I
12 found the case -- it's the *Darton Environmental* case. That was
13 a Western District of Virginia case of 2018, and they cite an
14 Eastern District of Virginia case of 2015 affirmed by the
15 Fourth Circuit in 2017 for the proposition that the
16 confidentiality agreement is unenforceable.

17 MR. SWANSON: Yes, Your Honor. I'm not familiar
18 with the *Darton* case. We cited a case in our brief, *Shire*,
19 from the Western District of Virginia that declined to follow
20 the two Virginia state court cases that Castle Hill has cited,
21 it's *LaserShip* and *BB&T*. The court in that case said it was
22 unwilling to predict that the Virginia Supreme Court would
23 follow those two -- those are lower court Virginia cases -- and
24 the court said it was reluctant to find that the Virginia
25 Supreme Court would follow those cases in light of case law

1 distinguishing between noncompetes, where generally you can't
2 have a noncompete of perpetual duration and a confidentiality
3 agreement. And so the court in *Shire* drew that distinction and
4 we think that's the right one here.

5 I think if you actually look at *LaserShip* and *BB&T*,
6 those two lower court Virginia cases, the *LaserShip* case was
7 focused not just on duration, but was focused on the scope of
8 the confidentiality agreement there. The court says that it
9 found the agreement covered all sorts of information, including
10 information that was not confidential or proprietary, and it
11 would apply to disclosures to anyone, including a neighbor.
12 And so I think that distinguishes the *LaserShip* case and
13 probably, you know, influenced the court's decision there.

14 And then the *BB&T* case, which does talk about duration,
15 that relies solely on the *LaserShip* case. And incidentally,
16 the *LaserShip* case doesn't cite any authority on this point, it
17 just made the finding.

18 And so I think the type of confidentiality agreement
19 that VGT had with Mr. Suggs and other employees, which notably
20 is similar to the confidentiality agreement that Castle Hill
21 has, which is also for a perpetual duration, these are very
22 common agreements and it's consistent with general trade secret
23 law, that something remains a trade secret until it ceases to
24 be a trade secret until it becomes generally known to the
25 public. And so I think to find that these agreements are

1 unenforceable would be -- would be pretty remarkable.

2 I will have to look at the *Darton* case and I'd be happy
3 to get back to Your Honor on that.

4 THE COURT: I'd hesitate to be the first court to
5 find them unenforceable but --

6 MR. SWANSON: Yes. The other point I would mention
7 on this issue, Your Honor, is putting aside the contractual
8 confidentiality duty, there's also in Virginia a common law
9 duty of confidentiality to your former employee. And I did not
10 see Castle Hill disputing that point in their brief, and so I
11 think we can -- it's unnecessary to address the enforceability
12 of the contracts for that reason.

13 THE COURT: Right.

14 MR. SWANSON: So --

15 THE COURT: All right. Response?

16 MR. ANTONELLI: Good afternoon, Your Honor. Matthew
17 Antonelli again for defendants. I'll be addressing the trade
18 secrets issues today.

19 So I want to start kind of towards the end of the
20 discussion you were having with Mr. Swanson regarding the
21 enforceability of Mr. Suggs' agreement. Just one quick comment
22 on the *Shire* case which plaintiffs rely on for the proposition
23 that Virginia courts have not uniformly rejected
24 confidentiality agreements with indefinite durations in scopes.

25 What's interesting about that case is the posture it

1 was in at the time that the ruling that they cite was made, and
2 that was actually on a motion to dismiss where the court ended
3 up saying in its ruling that there were -- the court needed to
4 have a more fully developed factual record in order to really
5 understand the limits of what that agreement did or did not
6 provide for.

7 So the court here is not faced with that limitation;
8 you have a full factual record. We've referenced specific
9 items from Mr. Suggs' agreement, and the significance of those
10 items are that it's indicative of VGT's entire approach to what
11 it considers to be its trade secrets and confidential
12 information because essentially they think it's everything they
13 ever do with respect to their business. It's been an issue
14 that we've encountered throughout the case as we've really
15 drilled down on the specific trade secrets --

16 THE COURT: Well, but even if that's true, we're
17 focused here on the algorithms, right, the bingo card
18 generation and the testing algorithm? Correct?

19 MR. ANTONELLI: Correct.

20 THE COURT: I mean, surely that would be -- those
21 are things that would commonly be covered both by a common law
22 obligation and a contractual obligation if that's enforceable;
23 correct?

24 MR. ANTONELLI: If the agreement is enforceable, it
25 would cover those items, yes.

1 THE COURT: Okay. Let me ask you then just
2 procedurally for purposes of summary judgment: I note that in
3 paragraph 11 of the motion for partial summary judgment, VGT
4 states that VGT requires its employees to undertake
5 confidentiality obligations to VGT, and then that's undisputed
6 in docket 240, paragraph 11.

7 Based on this concession for the purposes of summary
8 judgment, do I even need to inquire as to whether the Suggs'
9 agreement is enforceable under Virginia law because you've
10 conceded it away?

11 MR. ANTONELLI: I don't know that I agree that we've
12 conceded it completely away, Your Honor. I think the
13 concession was that they require their employees to sign
14 certain agreements.

15 THE COURT: I figured that's --

16 MR. ANTONELLI: Whether that agreement is
17 enforceable or not when signed by an employee who's not a
18 lawyer when a document's stuck in front of their face and they
19 say, here, sign this or you can't work here I think presents
20 some different issues that the court can consider.

21 THE COURT: All right. Well, I anticipated that
22 argument.

23 So what court in Virginia has definitively said that
24 such agreements are unenforceable if they're of indefinite
25 duration?

1 MR. ANTONELLI: So there is not a universal rule in
2 that respect, Your Honor. The cases that we cited in the brief
3 addressed the fact that courts routinely reject both
4 noncompetes and confidentiality provisions that have indefinite
5 scope or indefinite duration. But we have not -- we've not
6 argued that it was a hundred percent in all cases that all
7 confidentiality agreements would be unenforceable.

8 I think when we look at the specifics of the
9 confidentiality agreement here -- and also Mr. Swanson raised a
10 point a little bit in passing about one of the cases and an
11 employer interpreting it as someone couldn't share something
12 with their neighbor. I mean, here, we've actually dealt with
13 the issue of how restrictive VGT believes its agreements are in
14 the context of one of the other motions that's been filed and
15 briefed. We understand it's not before the court today, but it
16 has to do with VGT's assertion throughout this case that Castle
17 Hill employees have violated their employment agreements by
18 potentially discussing certain issues with counsel in the
19 course of the defense.

20 So we actually have some more evidence here about how
21 broadly VGT really interprets their agreement. The language of
22 the agreement actually dovetails into Mr. Suggs' testimony,
23 which we cited in our opposition, where he says, yes, I
24 signed -- you know, I signed a confidentiality agreement. With
25 respect to the individual items that are at issue, with respect

1 to the bingo card generation algorithm, he says, well, no, I
2 never specified that that was necessarily one of the items that
3 was covered under my agreement.

4 So if you look at the agreement itself, it's written in
5 such broad language that anything that an employee worked on
6 while an employee at VGT, I believe VGT could -- would assert
7 that any discussion of that material later on would be a
8 violation of, you know, trade secrets or confidential business
9 information.

10 THE COURT: But isn't it rather compelling to assume
11 that something of that importance would be covered by a
12 confidentiality agreement? Isn't that kind of an integral part
13 of this software and game configuration?

14 MR. ANTONELLI: Well --

15 THE COURT: Both the bingo card generation algorithm
16 and the verified -- now, did Suggs work -- remind me: Did he
17 develop the other algorithm, the uniqueness testing algorithm?

18 MR. ANTONELLI: Mr. Suggs worked on both algorithms,
19 Your Honor.

20 THE COURT: All right. They're both pretty
21 important and pretty integral to this whole machine, aren't
22 they?

23 MR. ANTONELLI: Well, I don't want to conceded that
24 the bingo card generation algorithm is a trade secret. I think
25 that's a little bit of a separate issue.

1 THE COURT: Right.

2 MR. ANTONELLI: So if the court's question is, would
3 obvious trade secrets be covered by the agreement, I think the
4 answer is perhaps yes, but I do not agree that the bingo card
5 generation algorithm is a trade secret.

6 THE COURT: All right. Discuss the law with me here
7 briefly. Because I read Judge Brinkema, who's fairly
8 well-known, he says in this *Brainware* case that -- of course
9 the context in which he made this statement perhaps describes
10 why he used this wording -- but he says, "Defendant provided no
11 legal support for his argument that the indefinite duration of
12 the nondisclosure provision rendered it per se unenforceable."

13 So as I read this thing, I thought at first, Well,
14 either an indefinite duration in a nondisclosure provision is
15 enforceable or it's not. So you suggest that it depends. What
16 would it depend on? Isn't it a binary decision, either
17 indefinite duration is enforceable or it's unenforceable? Why
18 would it depend on the facts of a case?

19 MR. ANTONELLI: I think in the cases that we've
20 cited, the courts have uniformly found that indefinite
21 duration is improper under Virginia law. So that would be the
22 ruling that we would ask the court to make here, is to find the
23 indefinite duration that's included within VGT's
24 confidentiality agreement particularly because of its breadth.

25 So I understand -- I understand VGT's argument that

1 there may be obligations with respect to a narrow scope of
2 trade secrets, the secret sauce, but that's not what the
3 confidentiality agreement here is limited to. It goes to
4 essentially, again, all aspects of anything an employee can
5 conceivably work on while an employee of VGT.

6 And further, Your Honor, under Virginia law, the
7 Virginia courts do not blue-pencil or modify agreements so they
8 -- if an agreement is overbroad, it's thrown out wholesale.

9 THE COURT: Okay.

10 MR. ANTONELLI: But turning back to the underlying
11 issue of whether or not this is a trade secret in the first
12 place, unless the court has any further questions regarding the
13 confidentiality agreement --

14 THE COURT: No, sir.

15 MR. ANTONELLI: -- one thing that I thought was
16 interesting that Mr. Swanson argued was with respect to the
17 operator manuals and the various manuals that VGT routinely
18 provides to customers, including casino customers. One such
19 manual is part of the record, it's included as Exhibit D to
20 VGT's motion. I know we also included it -- we made reference
21 to it in response to VGT's motion and also included it as part
22 of our affirmative motion for summary judgment.

23 And what's interesting about that manual is that while
24 it -- no, it does not contain the bingo card generation
25 algorithm in that it's a paper document that doesn't contain

1 source code. It lists in significant detail the various steps
2 that VGT claims consist of its trade secret. And this is an
3 important point because VGT has consistently pointed to or
4 relied upon the declaration of Mr. Davis, which the court
5 recently addressed in one of its rulings, as evidence that this
6 operator manual was, in fact, not provided to any casinos or
7 not provided to casinos that didn't have confidentiality
8 agreements. And as the court's ruling early this week held,
9 Mr. Davis' declaration has been stricken on those points except
10 for his qualified statement that to his knowledge the bingo
11 card algorithm had not been provided to casinos.

12 That's specifically in VGT's affirmative motion for
13 partial summary judgment. In their statement of fact No. 13,
14 they claim they haven't publicly disclosed this. The only
15 evidence that they cite for that proposition is the Davis
16 declaration at paragraph 16 which is a paragraph that the court
17 has stricken its entirety.

18 And while I know we're not talking about Castle Hill's
19 motion for summary judgment now, the same is true on our side
20 of the fence, where Mr. Davis has been pointed to as the source
21 of facts to rebut our proposition and the testimony that we
22 cited from their employees that operator manuals are provided
23 to casinos. We think that makes sense based on what the
24 document itself says.

25 So at a minimum, I think there is a question of fact

1 here regarding what exactly is or isn't provided to the casinos
2 with respect to the operator manuals and the extent to which
3 the operator manuals address the bingo card generation
4 algorithm.

5 THE COURT: Okay. Explain to me, a
6 nonmathematician, non-casino owner, what steps there are, you
7 say, claim trade secrets that would disclose -- within these
8 manuals disclose trade secrets to me if I'm a casino.

9 MR. ANTONELLI: So VGT essentially says our trade
10 secret consists of [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 THE COURT: No. But that's apparently ubiquitous.
14 [REDACTED], I mean, they're not claiming
15 that that's a trade secret.

16 MR. ANTONELLI: Well, they claim that it's one of
17 their [REDACTED] steps in their trade secret.

18 So I agree with the court, I think the record is
19 abundantly clear that the [REDACTED]
20 [REDACTED] is not a trade secret.

21 THE COURT: Correct.

22 MR. ANTONELLI: What VGT would argue is that despite
23 the fact that we've demonstrated that all the component parts
24 are readily known and available in patents and online, you can
25 find them on Google, that, nevertheless, because that complete

1 -- the exact steps as they describe them is not set forth, that
2 they get trade secret protection. I don't think that's what
3 the law provides.

4 But with respect to the manuals, I mean, the manual --
5 I'll just read to Your Honor from the manual. Again, it was
6 included as Exhibit D to VGT's motion for summary judgment.
7 There's a page that says "bingo card generation." [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 THE COURT: So your position is that alone gives the
16 roadmap?

17 MR. ANTONELLI: That is the roadmap. When they talk
18 about their [REDACTED] steps, it's articulated perhaps slightly
19 differently than they'll articulate it to the court in the
20 context of this motion, but those are the steps.

21 So, again, we think it's pretty clear that these
22 manuals have been provided to casinos, including with [REDACTED]
23 [REDACTED] in
24 place. But at a minimum -- Certainly with respect to VGT's
25 motion for partial summary judgment, at a minimum there's a

1 question of fact here, and that's particularly in light of the
2 court's recent rulings with respect to the Davis declarations.

3 THE COURT: All right. Anything else?

4 MR. ANTONELLI: Yes, Your Honor. Turning to, again,
5 the specific steps that VGT says consist of its trade secret,
6 again, as the court just noted, VGT doesn't claim that use of
7 the [REDACTED] itself is a trade secret. They don't
8 claim that [REDACTED]
9 is a trade secret. Again, we've cited many instances included
10 from Wikipedia about use of these things.

11 And then when we get to the idea of [REDACTED]
12 [REDACTED], which is something that VGT focuses on, [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED], we cited in
17 response to their motion at our response to statement of fact
18 19 at least four patents or patent applications that implicate
19 the very steps that VGT claims consists of its trade secrets.

20 In response to our citation of those patents, which is
21 certainly something the court can, and we urge should, take
22 judicial notice of, something that VGT does not contest, they
23 themselves in their opposition to our motion asked the court to
24 take judicial notice of some trademark registrations, VGT
25 really doesn't address any of those patents on the merits.

1 They just say the court should ignore them because they've been
2 raised in an opposition to their summary judgment motion.

3 What's important on that point, Your Honor, is that we
4 did not argue and we did not offer those patents as something
5 that we are claiming that Mr. Suggs or others at Castle Hill
6 specifically referenced. That was not the argument we made in
7 our opposition. We just thought it was important and clearly
8 relevant to the question of whether or not this [REDACTED]

9 [REDACTED]-based bingo card generation algorithm is a trade secret
10 in the first instance. We think it's very significant that
11 there's patents filed many years ago which implicate the
12 requisite steps that VGT claims you combine to come up with
13 their algorithm.

14 And one other point, Your Honor, which I think is
15 important here, and it's one that Mr. Gill touched on earlier,
16 is that this case started out in large part as involving
17 allegations of source code misappropriation. And as our expert
18 opined and explained, and as we've cited in our various
19 filings, there is no evidence of source code copying here.

20 And specifically with respect to the bingo card
21 generation algorithm, as we explained in our papers, Castle
22 Hill went out and actually found open source code on the
23 Internet with respect to the [REDACTED] pseudorandom
24 number generator algorithm and that's what they modified to put
25 into their code. So this is not a case where VGT is alleging

1 Mr. Suggs stole source code and then reviewed it.

2 THE COURT: I understand that.

3 MR. ANTONELLI: I think it's an important point
4 because they've continued to raise this issue about materials
5 that have been taken, or allegedly taken, without drawing a
6 cause and axis between any of those materials and the actual
7 trade secrets at issue.

8 THE COURT: I don't think they have to show
9 materials taken for purposes of that trade secret, do they?

10 MR. ANTONELLI: I don't think it's necessary for
11 them to, Your Honor. However, in their reply brief, I think
12 they again asserted, well, there is evidence that they took
13 source code. Well, that's really irrelevant to the question of
14 and shouldn't -- if they can't -- if they cannot draw a
15 connection between the materials that were allegedly taken and
16 the actual trade secret at issue, we're then talking about an
17 idea that Mr. Suggs just remembered, is what they would say,
18 because he worked on it at VGT and then he worked on something
19 solving a similar problem for bingo card generation at Castle
20 Hill.

21 And finally, Your Honor, the court was asking
22 Mr. Swanson a little bit about the timeline in terms of Castle
23 Hill's development of their bingo card generation algorithm and
24 I just want to lay it out for the court. The bingo card
25 generation algorithm using the [REDACTED] has never been

1 used on any machines that are in the field. Castle Hill does
2 not have any, and has never had any, slot machines in any
3 casinos that use that algorithm. There is a different
4 algorithm that uses a different pseudorandom number generator
5 that Castle Hill has used for the life of the company.

6 THE COURT: Well, perhaps I got the wrong
7 impression, but I just didn't see that the particular random
8 number generator is particularly important here. Is it?

9 MR. ANTONELLI: [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 And as I understand VGT's motion for partial summary
16 judgment, it relates only to the code that was submitted to BMM
17 Testlabs and not to the -- not to any other bingo card
18 generation algorithm, not to the bingo card generation
19 algorithm that's currently used in the field and not to --
20 there's actually a third approach, a slightly different
21 implementation that has since been explored, which Al Roi reau,
22 one of Castle Hill's engineers and one of the 30(b)(6)
23 designees in this case, explained the withdrawal of what we
24 refer to as the "BMM code" -- that's the [REDACTED]
25 code -- and Castle Hill's movement in a different direction.

1 THE COURT: Okay.

2 MR. ANTONELLI: Unless the court has any other
3 questions.

4 THE COURT: Is it Castle Hill's contention that the
5 Trade Secrets Act and/or the Virginia Trade Secrets Act require
6 proof of damages or harm?

7 MR. ANTONELLI: Your Honor, that would go to perhaps
8 the appropriate remedy, but those statutes do not require a
9 show of harm as an element of establishing a claim.

10 THE COURT: All right. Thank you very much.

11 Any reply, given that this is the plaintiff's motion,
12 Mr. Swanson?

13 MR. SWANSON: Yes, Your Honor. Just briefly.

14 THE COURT: Then we'll take a short recess after
15 Mr. Swanson.

16 MR. SWANSON: So I just wanted to start by, if I
17 can, showing Your Honor the manual that Mr. Antonelli
18 mentioned, which is Exhibit --

19 THE COURT: I've got so many in front of me. Which
20 number is it?

21 MR. SWANSON: The docket number would be 179, I
22 believe, Exhibit D.

23 THE COURT: Yeah. I don't have it in front of me.

24 MR. SWANSON: Okay. I can also pull it up here on
25 the screen.

1 THE COURT: Oh, I'm sorry. I do have it here,
2 179-D.

3 MR. SWANSON: Exhibit D.

4 THE COURT: Thank you.

5 *(Discussion held off the record)*

6 MR. SWANSON: And just point Your Honor to the first
7 page of this document. This is not an operator manual; this is
8 a reference manual. That's what it says on the first page.
9 The testimony they're relying on for operator manuals from an
10 employee named Butch McGill, he was not asked about this
11 document and they didn't ask any other witness if this
12 reference manual was ever disclosed to customers.

13 The only evidence in the record is the sentence in the
14 Davis declaration that was not stricken that to his knowledge
15 this reference manual has never been disclosed to casinos.
16 That's the only evidence we have; therefore, there's no genuine
17 dispute.

18 THE COURT: All right. You're saying it's apples
19 and oranges?

20 MR. SWANSON: Yes, Your Honor.

21 THE COURT: This is not the operating --

22 MR. SWANSON: This is not. And, again, we produced
23 the operator manual, they have it, and it's different.

24 THE COURT: All right.

25 MR. SWANSON: On the point about they've produced

1 patents and other documents that, you know, each one may have
2 one step or one element of the algorithm, just on the patent
3 point we asked them for any documents they had during discovery
4 that they would rely on in defense of the trade secret claims.
5 They didn't disclose the patents. We actually filed a motion
6 to compel on this which we withdrew after they represented that
7 they had produced everything they intended to rely on. Their
8 expert did not produce the patents. The first time we saw them
9 was in their opposition to the summary judgment motion.

10 But putting all of that aside, their argument is still
11 legally insufficient, and I would point Your Honor to the *Hertz*
12 case that we cite, 576 F.3d 1103, in which the Tenth Circuit,
13 again applying Colorado law but it's the Uniform Trade Act,
14 says, "The presence of all of the elements of an idea in
15 technical literature does not suffice, per se, to destroy trade
16 secret status since the secret might be in a combination of
17 otherwise well-known principles," quoting *Milgrim*, the treatise
18 on that. So their arguments -- even if you credit the factual
19 statements they're making, the argument's legally insufficient.

20 And I think that's -- I think those are the points I
21 wanted to make.

22 THE COURT: Thank you very much. Let's take a
23 ten-minute break. We'll be back for defendants' motion for
24 summary.

25 (Short break)

1 THE COURT: Before we move on to the other motion
2 for summary judgment, I want to ask here: I have in my hand
3 docket 179-5, which is a page from the 2003 bingo reference
4 manual. It's page 3 of 26. The first sentence on that page
5 says, [REDACTED]

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 Now, as I understand it, VGT was saying, well, these
10 games are leased so they're not owned by the casinos, and
11 therefore, the bingo reference manual doesn't go to the casinos
12 because they're not the rightful owner. Well, if that was the
13 case, why didn't this just say, "This document must remain
14 within the confines of VGT"? I mean, who is a rightful owner
15 of the particular VGT cabinet, if not the casino? Although my
16 understanding of the law under leaseholds is, you know, VGT
17 would own it if they're leasing it.

18 So who does this bingo reference manual go to?

19 MR. SWANSON: Your Honor, you are right that VGT
20 owns all of its machines and leases them so VGT is the owner of
21 all the machines.

22 Candidly, I'm not exactly sure how that language ended
23 up here. It looks like it was maybe just "inartfully" drafted.
24 But this reference manual would be used internally and it's
25 given to the test labs like BMM, and there are a couple of

1 others, who would receive this to understand in certifying
2 VGT's games how the games work so they can verify that they
3 comply with regulations and other technical requirements.

4 THE COURT: Well, the next sentence says, "This
5 document may be provided to gaming regulatory agencies or
6 attorneys as an evaluation and/or informational tool," and that
7 makes sense. But that language is just head-scratching.

8 MR. SWANSON: Yes, Your Honor. Again, VGT does own
9 all the games. Yeah, it's --

10 THE COURT: All right. Let me get Castle Hill's
11 view of that. Mr. Antonelli.

12 MR. ANTONELLI: Yes. Thank you, Your Honor. The
13 question that the court just raised was an issue that we did
14 raise in connection with our briefing on this issue. And,
15 again, I think it seems apparent to us that that document was
16 intended to be circulated outside of VGT. I think, again, at a
17 minimum, this presents an issue of fact as to whom that
18 document was distributed and for what purpose. The reference
19 in there to the [REDACTED] really doesn't
20 make sense if that's just a document that's internal to VGT.

21 And, again, when VGT had an opportunity to explain this
22 manual, they offered the declaration of Mr. Davis, which the
23 court has stricken, and portions related to the manual.

24 THE COURT: In part.

25 MR. ANTONELLI: But even what was stricken,

1 Mr. Davis doesn't say, this is a manual that we use for
2 internal purposes at VGT. He says, well, I don't think this
3 has ever been sent outside of VGT.

4 So I think there remain some significant questions of
5 fact there that would preclude a finding of judgment on this
6 issue.

7 THE COURT: Castle Hill has no evidence that it was,
8 in fact, distributed to casino owners or outside of VGT;
9 correct?

10 MR. ANTONELLI: Well, we have the testimony of
11 Mr. McGill that we cited where he's -- where he's referencing
12 operator manuals. I understand VGT's argument today that this
13 is not an operator manual. Although, I think that presents
14 another question of fact because VGT hasn't presented what they
15 assert an operator manual is to the court as part of this
16 record. So it's our -- it's our understanding that that is an
17 operator manual and it's provided to the casinos.

18 The evidence is undisputed that [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 THE COURT: And you've not been provided in
22 discovery with a separate operator manual?

23 MR. ANTONELLI: Your Honor, I would have to go back
24 and look as to whether or not there is a separate document that
25 says "operator manual" on the front of it. As I stand here

1 today, I'm not aware of one but I don't want to represent to
2 the court something that I'm not sure -- I'm not certain of.

3 THE COURT: Very good. Thank you.

4 MR. SWANSON: Your Honor, may I just briefly
5 respond?

6 THE COURT: Yes, sir.

7 MR. SWANSON: Which is, I don't recall how many
8 depositions they took in this case, but they did not obtain
9 testimony from any VGT employee that this manual is distributed
10 outside of VGT other than to testing labs. And what matters
11 for purposes of the motion and our claim is not what it was
12 said in the document but what actually happened to the
13 document. And on that, the only evidence we have is Mr. Davis'
14 statement that to his knowledge this is not distributed outside
15 of VGT.

16 THE COURT: All right. Defendants' motion for
17 summary judgment.

18 MR. GILL: Thank you, Your Honor. Robert Gill once
19 more for the defendants. I'm going to address the trademark
20 claims; my colleague, Mr. Platt, is going to address the trade
21 dress claims; and Mr. Antonelli will once again address the
22 trade secret claims.

23 In the course of this litigation, which has been raging
24 on with some intensity for a little over a year and a half,
25 going on two years, there have been very little that the

1 parties have seemed to be able to agree to. But finally in the
2 course of briefing, the summary judgment motions, it seems
3 we've reached some ground where there is perhaps some agreement
4 in terms of where the dust has settled and where that needs
5 leads us.

6 *(Discussion held off the record)*

7 MR. GILL: So at this point, my understanding from
8 the papers is the only registered trademark claim that remains
9 by the plaintiff is the registered trademark for Mr. Money Bags
10 design.

11 THE COURT: Correct.

12 MR. GILL: And that the remaining claims, based on
13 infringement of registered trademarks, have been abandoned.
14 Therefore, the remaining claims under Count 1 of the amended
15 complaint should at this point be dismissed because the
16 plaintiff is not prepared and has not produced the evidence in
17 support of those claims.

18 So, for example, the claims based on -- for registered
19 trademark claims based on Crazy Bill and Mr. Money Bags -- or
20 actually not Mr. Money Bags -- Polar High Roller and Greenback
21 Jack are now gone.

22 Now, I understand that VGT has common law trademark
23 claims that remain. VGT also has -- to be clear they have
24 registered trademark claims, just word mark claims, not design
25 logos or other registered marks for certain of their games, but

1 VGT has said we are not making claims for infringement of those
2 word marks standing alone. They are making a claim for
3 infringement of those word marks in the context of the entirety
4 of the appearance of the electronic gaming machines, meaning
5 use of the name, use of the character, use of the artwork in
6 connection with the games. Those claims remain. Those are
7 common law claims, not registered trademark claims.

8 So other than the registered trademark claim for
9 Mr. Money Bags' design, defendants at this stage of the
10 proceedings are entitled to judgment on Count 1, which is for
11 breach of -- or for infringement of registered trademark for
12 all claims other than the Mr. Money Bags' design mark.

13 THE COURT: And just for the record, plaintiff
14 agrees in that regard?

15 MR. ROMAN: Yes, Your Honor.

16 THE COURT: Very good.

17 MR. ROMAN: Now, to be clear, Your Honor, we don't
18 agree that judgment is warranted on the claims that have been
19 withdrawn. But we agree with Mr. Gill that we've narrowed the
20 claims over the course of the litigation and Mr. Gill has
21 accurately set forth the claims that are still live.

22 MR. GILL: Okay. I'm not sure I understand why
23 defendants would not be entitled to judgment on those claims.
24 Those claims were asserted in the original complaint. They
25 were asserted in the amended complaint the plaintiff appended

1 to its original and amended complaints --

2 THE COURT: Yeah, I've not wrapped my mind around
3 that statement either. I mean, to the extent that they are all
4 other registered trademark claims, why wouldn't they be
5 entitled to summary judgment on those?

6 MR. ROMAN: I believe, Your Honor, it's common in
7 litigation to narrow and refine your claims. If we had not
8 brought the claims at all, they would have no claims of
9 judgment on them. If we were to later reassert them, they
10 could make whatever claims they want of waiver, estoppel, you
11 know, claim preclusion. They could assert that later but
12 they're not entitled to judgment.

13 We haven't conceded that we cannot establish it as a
14 matter of law. We're just not prosecuting them in this
15 lawsuit. So it's a withdrawn claim, it's not a judgment, and,
16 you know, it's not a litigated claim.

17 MR. GILL: With due respect to Mr. Roman, with whom
18 I enjoy a good working relationship that I have a considerable
19 amount of respect, I'm not sure I understand that comment.

20 THE COURT: That's not a common approach with me and
21 maybe he can further explain that. But let me ask just a
22 couple questions here just to get the ball rolling.

23 MR. GILL: Yes, sir.

24 THE COURT: Does Castle Hill concede that Mr. Money
25 Bags and design mark is incontestable?

1 MR. GILL: I believe that -- we do concede that it
2 is incontestable in the sense that the registration was made
3 and has been pending for such a time that they are eligible for
4 have incontestable status.

5 THE COURT: All right. Does the --

6 MR. GILL: Now, I will add that merely because a
7 mark becomes incontestable doesn't mean that it may not be
8 attacked on any ground.

9 THE COURT: I understand.

10 MR. GILL: It means that certainly for purposes of
11 distinctiveness then, the distinctiveness of the mark is
12 something that's incontestable.

13 THE COURT: I understand. Question two: Does the
14 Castle Hill house mark always appear on the artwork title card?

15 MR. GILL: Yes, it does.

16 THE COURT: All right. And is the same true with
17 VGT?

18 MR. GILL: It is true, it's my understanding, with
19 one exception. In the former practice, I believe VGT used its
20 house mark on all its games. It's my understanding that in
21 recent times, VGT has modified which house mark it uses on its
22 games because VGT was acquired by Aristocrat and the parent,
23 and I understand the Aristocrat house mark now appears on the
24 games. So with that, you know, correction, I think Your
25 Honor's statement is correct, that either the VGT mark or the

1 Aristocrat mark appears on their all games.

2 THE COURT: Does the Virginia Trade Secrets Act
3 require use of the trade secret to VGT's detriment?

4 MR. GILL: I believe it does.

5 THE COURT: And does detriment require actual
6 damages?

7 MR. GILL: I think it does. Because I think to have
8 constitutional standing to be able to sue requires actual
9 injury.

10 THE COURT: Does Castle Hill concede that the
11 Oklahoma common law claim is not displaced to the extent it's
12 premised on information that does not or may not satisfy the
13 Oklahoma Uniform Trade Secrets Act's definition of trade secret
14 but is otherwise confidential?

15 MR. GILL: That's a mouthful.

16 THE COURT: Yes, sir.

17 MR. GILL: I believe as a conceptual matter, what
18 Your Honor has stated is correct. I think that it is
19 theoretically possible to have an Oklahoma common law claim
20 that is distinct from, and is not extinguished by, the federal
21 claim.

22 THE COURT: Right.

23 MR. GILL: But I will also state that the discovery
24 record in this case is such that Castle Hill asked the
25 plaintiff to identify the evidence that supported the Oklahoma

1 claim, and all the plaintiff did was refer to the same evidence
2 that supported the federal claim. It's on that basis, that
3 we've asserted that the Oklahoma claim has been extinguished
4 because it is the exact same evidence in support of it.

5 THE COURT: Well, but just trying to think logically
6 here -- and I may be wrong -- but to the extent -- even if they
7 rely on the same evidence, if the Uniform Trade Secrets Act
8 requirement, including the definition of trade secret, is not
9 met, then theoretically the Oklahoma common law claim might
10 still be able to proceed?

11 MR. GILL: I agree with that.

12 THE COURT: Okay. I suppose since you're addressed
13 to trademark, I need to limit my questions to you regarding
14 trademark; correct?

15 MR. GILL: I would appreciate that. My colleague,
16 Mr. Antonelli, is the one that is prepared to address those
17 issues today.

18 THE COURT: Okay.

19 MR. GILL: So I will defer to him. But I will
20 answer your questions to the extent I can.

21 THE COURT: All right. I think that's it. Go
22 ahead.

23 MR. GILL: All right. Thank you. With the court's
24 indulgence, let me grab a document.

25 THE COURT: Yes, sir.

1 MR. GILL: I can't help myself, but before I move on
2 to the rest of my points, to address Mr. Roman's statement
3 about what registered mark claims were made in this case.

4 Your Honor, I reference Exhibit 4 to the plaintiff's
5 first amended complaint, and in the complaint they reference
6 this exhibit as depicting those registered marks that are being
7 infringed, VGT marks as compared with the Castle Hill marks.
8 So, for example, the very first depiction on Exhibit 4 depicts
9 the VGT game Crazy Billions and on the right-hand side it
10 depicts the Castle Hill game Welcome to Nugget Mountain.

11 So based on the use of this exhibit in reference to
12 this exhibit in the body of the complaint, it's clearly
13 incorporated into the complaint, I certainly understand the
14 formal registered mark claims to include more than Mr. Money
15 Bags. And while I understand and appreciate the plaintiff's
16 statement, that it has made a decision to not pursue those
17 claims at this point, if we were earlier in the litigation I
18 might agree with what Mr. Roman said, but given that we are now
19 at the summary judgment stage, I'm entitled to know
20 conclusively what claims remain for trial. The fact remains
21 that the plaintiff did not contest our motion for summary
22 judgment on these remaining claims and it's conceded those
23 claims.

24 And so with due respect to what Mr. Roman said, I do
25 believe we're entitled to judgment on all registered trademark

1 claims other than the Mr. Money Bags design based on the state
2 of the pleadings in the case.

3 THE COURT: Okay. I've got Exhibit 4 in front of
4 me. I don't have the reference in the first amended complaint.
5 But you're saying Exhibit 4 is purporting to reference all of
6 the registered trademark claims?

7 MR. GILL: Yes. So these are mostly -- other than
8 Mr. Money Bags' design, these are word mark claims. But
9 they're nonetheless registered trademarks and they represent
10 valid -- I mean, procedurally they're not, you know,
11 incompetently done or invalid registered trademark claims.
12 It's just the plaintiff has not contested these at this stage
13 of the proceeding.

14 Based on that, I'm entitled to judgment based on the
15 state of play, other than as to the Mr. Money Bags' design,
16 which is something I will address again in the course of my
17 remarks to you. I'm not giving up on that point. I'm just
18 pointing out what I thought was, in essence, agreed to, based
19 on the state of the pleadings, what we're entitled to judgment
20 on. Under Count 1, that would be everything by agreement,
21 everything other than Mr. Money Bags' design.

22 THE COURT: All right. Doesn't a genuine issue of
23 material fact exist with respect to likelihood of confusion
24 regarding Mr. Money Bags?

25 MR. GILL: With regard to the design mark, Your

1 Honor?

2 THE COURT: Yes.

3 MR. GILL: No, I don't believe it does. And this is
4 true for the Mr. Money Bags design mark and this is also true
5 for the remaining common law marks that the plaintiff continues
6 to assert and claim in this case.

7 If you look -- and one of the issues in this case --
8 and this is a pervasive theme that we have dealt with as
9 defendants in this case through its entirety -- when we had a
10 very first hearing in the case, the hearing concerned the
11 sufficiency of the alleged trade secret claims, and then later
12 on we have dealt with the sufficiency of the allegations of
13 trademark and trade dress claims.

14 And with regard to the trademark claims, the -- if
15 you're talking about the registered mark claim, I think it's
16 clear they are not entitled to judgment actually on the -- and
17 we would be entitled to judgment on the Mr. Money Bags design
18 mark just based on the comparison of the marks themselves. And
19 the *Hornady* case from the Tenth Circuit tells us that the most
20 important of the six factors is a comparison of the marks.

21 And one thing that is to me remarkably absent from the
22 plaintiff's briefs on summary judgment in this case is an
23 analysis of the likelihood of confusion factors for each of the
24 trademarks that are asserted in this case. And so what instead
25 the plaintiff has done is the plaintiff has melded together in

1 one section, if you will, not just all of the marks for which
2 they're claiming, but also lumped in together the trade dress
3 which they're claiming, which we assert is improper and is a
4 violation of the pleading standards.

5 The *Forney* case, which the parties have cited in this
6 matter, also from the Tenth Circuit, makes clear that a
7 plaintiff has the burden of articulating clearly what the
8 elements of his Lanham Act claim are. And we think that's an
9 issue here.

10 But to be clear, the similarity of the marks element
11 alone of the likelihood of confusion factor for Mr. Money Bags
12 I think compels judgment against the plaintiff. We have, you
13 know, the opposite mark for Mr. Money Bags, the one that
14 plaintiff claims Castle Hill's infringing is the game New
15 Money, and the plaintiff didn't do the likelihood of confusion
16 analysis on these two marks. But, again, if you just look at
17 the similarity of the marks alone, which *Hornady* says is the
18 most important factor, you know, that tells us that there's no
19 likelihood of confusion among the consuming public.

20 Obviously, there are other elements of the analysis as
21 well. We have the -- you know, it depends on which case you
22 look at and which order these elements come in. We have the
23 actual confusion element or factor. In this case, that's a
24 factor that cuts against the plaintiff. The plaintiff doesn't
25 have evidence of confusion. They had the survey, which they

1 had commissioned by Dr. Wind, and Your Honor, of course, issued
2 the ruling.

3 THE COURT: Little weight.

4 MR. GILL: Exactly.

5 THE COURT: Right.

6 MR. GILL: And the methodology was flawed.

7 And then we have -- in addition, we have, which the
8 plaintiff relies on -- and I understand their inclination to
9 rely on it -- is the evidence of actual confusion. But the
10 evidence of actual confusion -- and with due respect to the
11 plaintiff, I know they disagree with me on this -- but this is
12 really de minimis evidence. Because if you look at the
13 instances --

14 THE COURT: Two of fourteen.

15 MR. GILL: Exactly. So the governing law requires
16 that the instances of actual confusion involve members of the
17 consuming public, and the vast majority of these involve VGT or
18 casino employees and not members of the consuming public.

19 So this evidence is not only -- is there not much of
20 it, it's de minimis in quantum, but it is also not probative.
21 You know, it's not an instance, for example, where -- you know,
22 there's very few where specific marks or trade dress can be
23 identified. I definitely saw -- of the few that could be
24 specifically identified, one did involve Mr. Money Bags but
25 that's just one. There's none other, no other such evidence,

1 for this claim. So we don't have a survey to provide that
2 confusion evidence. We don't have, other than this literally
3 one instance that I can find for Mr. Money Bags, a single
4 instance of actual confusion.

5 We have the dissimilarity of the marks. You know, we
6 have the intent. Well, the intent -- of course intent's
7 usually a factual issue, but here we have -- but it's intent
8 that's measured at the time the mark is adopted. So we have
9 the New Money mark that was adopted by Castle Hill, which the
10 evidence establishes is used always with the Castle Hill house
11 mark.

12 *Water Pik* and other cases tell us that when you have a
13 manufacturer of consumer goods that routinely uses its house
14 mark on its goods, that's an evidentiary point that helps
15 prohibit or stop any risk of confusion, it doesn't sew
16 confusion.

17 We also have evidence in the record where Castle Hill
18 used on its games the so-called "topper," which kind of looks
19 like an iPad stuck on the top of one of these games, which
20 further helps distinguish the appearance of the Castle Hill
21 games --

22 THE COURT: Not much.

23 MR. GILL: Well, you know, to me to look at a game
24 that has the topper with the iPad appearance and a game that
25 doesn't have it, it's a remarkably different appearance.

1 THE COURT: Given the statement of the Castle Hill
2 employee -- and I'm forgetting the name right offhand -- when
3 shown the New Money concept, I mean, that's pretty persuasive
4 evidence of intent to pass off goods as those of another, is it
5 not? And that, in turn, supports a finding of likelihood of
6 confusion, doesn't it?

7 MR. GILL: Well, could you help me with the
8 statement that you're referring to, Your Honor, the statement
9 of the Castle Hill employee?

10 MR. ROMAN: Your Honor, I can help there.

11 THE COURT: Yes, sir. Go ahead.

12 MR. ROMAN: Okay. It's statements by two Castle
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]

16 THE COURT: Right.

17 MR. GILL: Well, what we have is, we don't have a
18 statement of intent by somebody who's in management at Castle
19 Hill. We have banter between employees that are either
20 software people or artists, but not management of the company,
21 that are joking between themselves about the New Money look.
22 This isn't, you know, any nefarious internal admission by
23 Castle Hill, this is, oh, you know, we're trying to make a copy
24 of Mr. Money Bags. That's not what this says. The appearance
25 of the game doesn't support that conclusion because the

1 appearance of the game is actually significantly different.
2 We've actually cited in our summary judgment motion where
3 there's another game maker that actually has a game called
4 "Money Bags" that's not the plaintiff.

5 So based on those facts, I think the likelihood of
6 confusion analysis cuts against the plaintiff. I don't think
7 they can show that -- you know, they don't have it on the
8 similarity of the mark. They don't have it on the confusion
9 issue. With regard to the intent --

10 THE COURT: Even with regard to the hat? I mean,
11 how similar does it have to be to get summary judgment -- or
12 dissimilar rather? I mean, isn't this really an issue for
13 trial?

14 MR. GILL: Well, I don't think so. Because if we
15 had a character that we were using that looked like the
16 Mr. Money bags, that would be one thing, but we have literally
17 a baby in a hat. They're using this, you know, fat,
18 high-roller type of guy who makes it looks like, you know, he's
19 a frequent casino regular and he's a high-roller and he goes to
20 casinos and he does well.

21 THE COURT: Right.

22 MR. GILL: That's the image that he's portraying and
23 we're showing -- the emphasis in our game is this is new, like
24 new and improved, this is new, but it's literally a baby with a
25 hat. I don't see it.

1 THE COURT: Yeah. But it's nudge, nudge, wink,
2 wink, inside joke, this is Mr. Money Bags' baby; right? I
3 mean, it presents kind of an interesting question. I mean, is
4 that similar enough?

5 MR. GILL: Well, I understand that one way or
6 another it's going to be decided by you, if not today, but at
7 trial. But I would submit to you respectfully that I don't
8 think the plaintiff has made the case here. I think the fact
9 that the plaintiff didn't go through the likelihood of
10 confusion analysis for this mark, or for the rest of its marks,
11 is basically a concession on this point. They haven't done
12 what they need to do to be able to establish the fact that
13 there -- they win on the likelihood of confusion analysis.

14 Based on the dissimilarity of the marks and the lack of
15 confusion and the intent issue, the intent that's been shown in
16 this case is really not an intent to copy marks because, again,
17 we have, you know, use of the house mark. And a few of the
18 instances of actual confusion that the plaintiff relies on here
19 are interesting to me because in actually a couple of these
20 instances the patrons that were discussing this talked about
21 the mark.

22 So, for example, if you look at -- in our motion to
23 exclude evidence of actual confusion, our paragraph 4 talks
24 about an online message board forum called "Jokers Wild" and it
25 references a user who identified herself as "Kim Kyle." And

1 Kim Kyle says that she visited the new casino and played the
2 machines, she was hoping to see red screens but she couldn't
3 tell, and she forgot to look at the brand. So even the
4 consumer that's having this discussion as this instance of
5 confusion cited by the plaintiff indicates that she knows
6 enough to look at the house brand to be able to indicate what
7 the origin of the games are.

8 THE COURT: But which way does it cut? I mean, as
9 someone not a regular, it seems to me from the images that
10 you've provided that those are fairly discrete. Your eye's
11 definitely not taken to that lower right corner; right?

12 MR. GILL: Well, I think that, you know, the same --
13 the visibility or prominence of the mark that's displayed by
14 Castle Hill is certainly no less than that that is displayed by
15 the plaintiff. So this isn't a situation where Castle Hill is
16 trying to camouflage its house mark in such a way that it's not
17 something that's obvious and discerning to the consuming
18 public. As a matter of fact, in most instances, the house mark
19 actually appears on the gaming machines in multiple locations.
20 So, to me, on the issue of intent, that clearly shows a
21 conscience effort by the manufacturer to not confuse the
22 consuming public which, of course, is the intent that's
23 relevant to the analysis.

24 But once we get beyond the Mr. Money Bags design issue,
25 there's, of course, the issue of -- the issue of the common law

1 marks that the plaintiff claims. But --

2 THE COURT: Before you go on, some of these marks in
3 the lower right-hand corner on, for instance, Welcome to Nugget
4 Mountain, it's fairly prominent because it's a white Castle
5 Hill insignia on a --

6 MR. GILL: For the record, may I ask Your Honor what
7 you're looking at?

8 THE COURT: I'm looking at Exhibit 4 that you just
9 referenced me to --

10 MR. GILL: All right. And it says page 2 at the
11 bottom; is that correct?

12 THE COURT: Let's see. Got to get down there.
13 Yeah, page 2.

14 MR. GILL: Okay. Right.

15 THE COURT: And your "CHG" is up against a brown
16 barrel so it's fairly readable. Then you go down to page 3,
17 New Money, and you've got "CHG" superimposed on green and
18 white. And granted, you can make it out but it's certainly not
19 a prominent feature, is it?

20 MR. GILL: Well, but think about the context,
21 though, Judge. This is a very small image in terms of the size
22 of this image that appears on this page. That image is about
23 an inch in height. When in life-size reality, the top of one
24 of these electronic gaming machines is taller than I am
25 standing here at the podium. So we're compressing what is in

1 reality a fairly significant size piece of equipment into
2 something that's an inch in height.

3 So, yeah, does it make it more difficult to see what
4 the house mark is based on this image? Yeah, it does. And I
5 think that's why.

6 THE COURT: Well, of course you're referencing the
7 entire height of the machine, but you've got five different
8 images running up and down that machine; right?

9 MR. GILL: Right.

10 THE COURT: Yeah.

11 MR. GILL: Right.

12 THE COURT: Okay. Well, small point.

13 MR. GILL: Right. Now, there's a different issue,
14 of course, that Castle Hill has raised with regard to the
15 Mr. Money Bags design mark, and that is whether or not --
16 regardless of the incontestable status, whether or not the mark
17 was properly registered by VGT in the first place because the
18 record does not conclusively show that VGT has exclusive rights
19 to that mark.

20 THE COURT: I thought you said it was incontestable?

21 MR. GILL: Well, it's contestable for purposes --
22 but actually you and I had discussion too. Yes, it's
23 contestable for purposes of determining whether or not it's
24 considered to be distinctive under trademark law, but that
25 doesn't mean that it's not possible to assert a claim as to the

1 validity of the underlying mark. One of the ways that you can
2 do that is to raise issues about whether or not the mark -- you
3 know, it represented exclusive rights that belonged to the
4 registrant at the time of the registration.

5 The factual record that was developed in this case
6 didn't show that VGT was the exclusive owner of those rights.
7 So the record actually shows that VGT obtained this mark, this
8 image, the design mark, from a third party, and that when it
9 bought this image or leased the image, it bought what was known
10 as a conversion kit, which included artwork, and it changed the
11 name from something called "Fat Cash" and changed it to
12 "Mr. Money Bags," but it acquired this from a company called
13 "Suburban Graphics."

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED] The record showed the Fat Cash
18 machine on a flier, a marketing flier, because that was one of
19 the things that Suburban Graphics was in the business of doing,
20 which was selling these conversion kits, among other things, as
21 well as artwork.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]

12 [REDACTED]
13 [REDACTED]
14 [REDACTED]. And if you
15 want to sue for infringement of a mark, then you must be the
16 owner of the goodwill, and the failure to include the goodwill,
17 I believe, is fatal to that.

18 So for those reasons, I think the VGT claim based on
19 Mr. Money Bags is procedurally defective for that reason.

20 THE COURT: Couldn't goodwill be presumed as part of
21 that which was required? Does it have to be explicit?

22 MR. GILL: My understanding is that it does need to
23 be explicit. I've actually been in a circumstance where I
24 needed to represent a client that was contemplating the sale of
25 a mark and possibility of litigation based on infringement of

1 the mark so I've actually had experience with this issue in
2 another context. The legal conclusion that we reached was that
3 the goodwill must accompany the transfer of the mark in order
4 to be able to sue for infringement.

5 And so for those reasons, we think that the claim by
6 VGT, based on Mr. Money Bags, is something that should be
7 dismissed.

8 And with that, I believe that brings us to the
9 plaintiff's claim for its common law marks. The common law
10 marks that are at issue don't just include specific machines,
11 it includes, according to the plaintiff, a family of marks that
12 go with those machines.

13 So, for example -- and this is just an example because
14 Mr. Money Bags is not one of the machines for which the common
15 law claim is asserted -- but, for example, there's the original
16 Mr. Money Bags and then there's, you know, Mr. Money Bags Road
17 Tripping and then Mr. Money Bags Lighting Wilds and then
18 there's Mr. Money Bags this. So there are variance, which the
19 industry tends to refer to game extensions, and the game
20 extensions have different artwork on them than the original
21 game.

22 So with the plaintiff's claim that it is asserting a
23 common law trademark for these other marks, then they are
24 effectively asserting a claim for not just the original mark,
25 but also the other derivative uses of those marks by them with

1 different artwork in commerce, and their claim expressly
2 encompasses those additional artworks that are used in
3 connection with those game extensions.

4 One of the problems that the plaintiff has for these
5 claims is that the -- the claims are unusual to me as somebody
6 who has had an opportunity to litigate trademark infringement
7 in other contexts. These claims that are asserted as common
8 law trademark claims by the plaintiff for these other games are
9 really more like trade dress claims because, according to the
10 plaintiff, it includes the name of the games that they're
11 claiming, it also includes the artwork for the game without
12 defining which specific artwork, for example, would be
13 included, and it includes the characters. And, you know, to
14 me, if that's the nature of the protection that's claimed, the
15 plaintiff really elected the wrong method in which to seek
16 protection for these things, and what they probably should have
17 done was obtain a copyright to try to protect the characters.
18 That way a modification of those characters in other artwork
19 would be a derivative work and they would have the rights to
20 those characters and that would be an easier and cleaner way to
21 do this.

22 But what the plaintiff has instead chosen to do is to
23 assert these common law claims with regard to its registered
24 word marks for which it doesn't have registrations for the
25 design or the logos or anything else, and it is making a

1 combination claim basically of those registered word marks
2 together with the artwork and the characters and the other
3 incidences of the appearance of those games, even though the
4 remaining incidences of the appearance of those games are not
5 protected by trademark registration.

6 THE COURT: All right. Help me out conceptually
7 then.

8 So we're not talking about a family of marks theory;
9 right? You're saying these are common law claims and implicate
10 a theory that you reference as game extensions?

11 MR. GILL: Yes, sir.

12 THE COURT: All right. And we're not to the
13 unregistered mark claims yet at all?

14 MR. GILL: No. These are unregistered mark claims.

15 THE COURT: All right.

16 MR. GILL: Yeah.

17 THE COURT: All right. So do you understand that
18 VGT has invoked the family of marks doctrine?

19 MR. GILL: Yes.

20 THE COURT: And is that separate and apart from game
21 extensions as you described them?

22 MR. GILL: It's in this case is they -- as these
23 other marks are used, the other marks are part and parcel of
24 the game extension concept. So, for example, I was a minute
25 ago using the example of Mr. Money Bags and Mr. Money Bags Road

1 Tripping. Well, the original Mr. Money Bags has different
2 artwork that appears on the glass of the machine.

3 THE COURT: I understand. But I'm just trying to
4 put these so that you and I are talking the same language here.

5 MR. GILL: Right.

6 THE COURT: So what's the difference between the
7 family of marks doctrine versus game extensions as you
8 explained them to me?

9 MR. GILL: The plaintiff, I believe, is making a
10 claim for a family of marks based on the fact that it uses them
11 in connection with these game extensions.

12 THE COURT: Okay. So you're saying it's the same
13 thing?

14 MR. GILL: Right.

15 THE COURT: Okay. So we're using the same language?

16 MR. GILL: I think so.

17 THE COURT: All right. Except that they've not used
18 the term "family of marks." They're using the term, as I
19 understand it, "a series."

20 MR. GILL: Yes, that's exactly right. That is --
21 that is the name that they use in connection with the marks.

22 And I will tell you that one of the problems I have
23 with this claim is that the plaintiff, in my view, has not
24 adequately identified exactly what it is it's claiming as a
25 trademark infringement -- as a common law trademark

1 infringement claim.

2 So, for example, it's given us a description and
3 basically said, attached to the complaint are images of our
4 machines and we are claiming the name and the artwork and the
5 characters. And in using their usual language, they're saying
6 including but not limited to. So we have a difficult time
7 understanding exactly what the borders or parameters are of
8 claim. But, to me, it's a defective claim, and the reason it's
9 defective is the plaintiff should have clearly articulated what
10 the claim is that it's asserting for common law trademark
11 infringement and it has not done so.

12 And, you know, a few minutes ago you heard me say that
13 the common law mark claims that the plaintiff is asserting are
14 really kind of in the nature of trade dress and they are.
15 They're very much like their trade dress claim. They don't
16 include, as I understand it, the cabinet like the trade dress
17 claim does, but even if its papers the plaintiff melds together
18 the way that it assesses these claims and it assesses them and
19 addressing them in one lump in both the common law infringement
20 claims and the trade dress claim.

21 But, to me, the legal obligation that was clearly
22 enunciated in the *Forney* case for a plaintiff to clearly
23 articulate what its claim is is a command that the plaintiff
24 violated here. Because I think the plaintiff should have
25 included in the text of its complaint an image of exactly what

1 it's claiming is a common law mark and, you know, how exactly
2 we are violating it or infringing it, and they should have done
3 that not just for one game in the series but for every game in
4 the series and they have not done that.

5 And on a related point, as you heard me say with
6 respect to the Mr. Money Bags and design mark, the plaintiff
7 also did not conduct an individual analysis of likelihood of
8 confusion for each of these marks, instead choosing to lump all
9 these marks together and address them together in one fashion,
10 which makes it very difficult for us as the defendant and for
11 the court to assess the issues of the likelihood of confusion
12 factors with regard to these marks.

13 It's our position that the plaintiff has failed by
14 failing to do that, by failing to articulate the claim clearly
15 and properly as they should have, and by failing to conduct the
16 likelihood of confusion analysis for each of the claims, the
17 plaintiff has failed to meet its burden with respect to these
18 claims.

19 And in addition to that, the plaintiff asserts argument
20 with regard to its common law claims. I'm looking for my
21 reference to that now. In VGT's opposition to our motion for
22 summary judgment, on pages 16 and 17, the plaintiff makes
23 certain argument with regard to its marks. So VGT says, "VGT
24 does not assert infringement of all of its registered marks.
25 The distinctiveness of these marks, though, is relevant to

1 VGT's unregistered marks because many of the unregistered marks
2 contain VGT's registered marks together with additional design
3 elements." And that's a quote from page 16 of the VGT
4 opposition.

5 And then in its concluding sentence in this subsection
6 on page 17 of its brief, VGT says, "Thus, the conclusive
7 presumption that the relevant registered word marks are
8 inherently distinctive should apply equally to the unregistered
9 word and design marks that includes such registered word
10 marks."

11 THE COURT: Yeah, do you know of any authority for
12 that proposition?

13 MR. GILL: None. And certainly none is cited for
14 that proposition in the VGT brief. As a matter of fact, it is
15 our position that this statement is fundamentally legally
16 incorrect.

17 A registered mark is entitled to a presumption; an
18 unregistered mark is not entitled to that presumption. VGT's
19 claims are for unregistered marks. The fact that they may
20 include a registered word mark within them doesn't mean the
21 entire common law mark is then entitled to a legal presumption.

22 The plaintiff knowingly and willingly and intentionally
23 did not assert a claim for trademark infringement of just its
24 word marks. It is asserting a claim only for these common law
25 marks that include the word marks and the artwork and the

1 characters, you know, in addition to other design elements that
2 have not been identified.

3 THE COURT: It's the court's intention to ask
4 counsel for authority for that proposition.

5 We're sitting at seven after 4:00 and we've got quite a
6 bit of additional argument to go on trade dress and trade
7 secret, as well as from the plaintiffs. So we'll need to --

8 MR. GILL: We do. We do.

9 THE COURT: -- hit the accelerator here.

10 MR. GILL: I will do that, Your Honor.

11 But I hope you understand the defendants' position here
12 that required some time to explain that the claims that the
13 plaintiff has asserted for these unregistered marks are
14 problematic in that they weren't sufficiently articulated in
15 the first instance, and the plaintiff did not properly respond
16 to the motion in such a way as to create legitimate material
17 issues of fact for purposes of summary judgment.

18 And in that regard, the plaintiff has not shown -- with
19 regard to the likelihood of confusion factors, the plaintiff
20 has not shown a similarity of the marks, which, of course,
21 *Forney* tells us this is the most important of the factors. The
22 plaintiff has not shown confusion as to the marks. We've
23 already addressed the issue that the survey was weak and the
24 instances of actual confusion were few, they were de minimis.
25 And, of course, the law requires a likelihood of confusion, not

1 a possibility of confusion, no matter how remote.

2 We have the issue of intent. The issue of intent has
3 not been addressed with regard to each of individual marks. We
4 haven't had the plaintiff address the issue of the strength of
5 the marks in an individual basis. We haven't had the plaintiff
6 address on an individual basis the issue of the degree of care
7 to be exercised by purchasers, or in this case, you know,
8 lessees of these machines.

9 The evidence shows pretty clearly that this is not a
10 low-involvement consumer purchase. It's not like going to the
11 7-11 and buying a pack of gum, where you might buy something
12 new that you haven't seen before based on the color of the
13 packaging. These machines are expensive. The floor space on
14 these casinos is dear to the casinos because they want every
15 machine -- basically these were reverse ATM machines. People
16 walk in these casinos every day and they shove money into them
17 and VGT makes money on them and so it's a great system. So if
18 they have a machine that's not performing well, then it's not
19 in their interest to leave that machine taking up floor space.

20 So these tribes that lease these machines are
21 sophisticated, and the record clearly establishes that they're
22 sophisticated. They know exactly what they're doing and they
23 monitor the performance of these machines on their floor. So
24 this factor cuts against the plaintiff because this is a
25 high-involvement purchase or lease by these casinos.

1 And then, you know, the one point I will concede, in
2 terms of the similarity of the products, they're both
3 electronic gaming machines and they are sold and used in the
4 same line of commerce. So that's a point that cuts against the
5 defendant but the other points, I think, all cut in favor of
6 us.

7 THE COURT: I do have a question for you. Who are
8 the relevant consumers for purposes of likelihood of confusion
9 analysis? The tribal casinos or the players or both?

10 MR. GILL: That's a great question. There's no
11 question that it's probably both in different contexts. The
12 casinos are the ones that make the decision about whether or
13 not they're going to place one of these machines on the floor
14 and give it exposure to a consumer in the first instance. But
15 on the other hand, it's the consumers that make the decision
16 when they come up to the machine whether they put money in the
17 machine or whether they go back and put money in a different
18 machine.

19 The record in this case suggests that the consumers
20 that actually go to the casinos and put money in the machines,
21 they are creatures of habit, they like to go back to machines
22 where they've won money. So not only will they go back, for
23 example, and play a Mr. Money Bags machine that they've played
24 before, they'll go back and play the very Mr. Money Bags
25 machine that paid them money the last time they were there. So

1 that's what the evidence shows and that evidence shows that
2 they are sophisticated.

3 And, of course, the example that I gave you --

4 THE COURT: Is that evidence of sophistication?

5 MR. GILL: Well, it's evidence that they're not
6 going to be duped by playing a machine that's not the one they
7 were looking for. So in that sense, it's evidence of
8 sophistication. Are they sophisticated because they're shoving
9 their money into a reverse ATM? Maybe not. But for our
10 purposes, you understand what I'm saying?

11 THE COURT: Yes, sir.

12 MR. GILL: All right. If you have any other
13 questions, I'm happy to address any of the other issues and
14 respond to Mr. Roman.

15 THE COURT: Thank you very much. Do we want to
16 address trade mark?

17 MR. ROMAN: Your Honor, I was prepared to respond to
18 both the trademark and trade dress, Mr. Swanson the trade
19 secret issues. I am mindful of the time. I'd like to get my
20 points out. There's a lot that Mr. Gill has brought out that I
21 would like to respond, but obviously it's your courtroom, Your
22 Honor, and we'll be guided by --

23 THE COURT: Why don't you address trademark.

24 MR. ROMAN: Okay. I was going to do them together.
25 Actually that's one of Mr. Gill's criticisms because the

1 analysis is so overlapping --

2 THE COURT: Well, as he referenced, let's hear trade
3 dress then from the movant.

4 I sentenced a guy yesterday to two years in prison. He
5 started out selling bingo supplies and then graduated with the
6 industry and he wound up placing ATMs in various casinos around
7 the state of Oklahoma. Apparently, he would get a piece of
8 every ATM transaction so he was making three-quarters of a
9 million bucks a year just on placing ATMs in casinos. His
10 mistake was he didn't pay the IRS for about eight years in a
11 row.

12 MR. ROMAN: So this is open for others to come take;
13 right?

14 THE COURT: Well, there was another lawsuit two
15 doors down that he filed against his employer when his employer
16 started -- the executives saw that their salesman was making
17 more money than they were and they fired him. So that's been
18 resolved. Go ahead.

19 MR. PLATT: Thank you, Your Honor. Henry Platt for
20 defendants talking about the trade dress.

21 As you've heard from Mr. Gill and from Mr. Antonelli,
22 we've been plagued with sort of a moving target on a lot of
23 these issues in this case, none more so than the trade dress.
24 The trade dress that is alleged in the original complaint is
25 night and day different than the trade dress that's alleged in

1 their opposition to their motion for summary judgment. That's
2 not withstanding the fact that they've requested and received
3 leave of court to file an amended complaint at the close of
4 discovery. I would then add that the trade dress described in
5 the discovery is quite different than what was in the amended
6 complaint, the original complaint, the opposition to the
7 summary judgment motion, and everything else.

8 So their description -- it's not just their description
9 that has changed, which we've sort of walked through a little
10 bit in the briefs. It's not that -- they keep saying that
11 they're entitled to refine their description, which is true,
12 but they haven't refined it, they've changed it. They've
13 completely changed what they're actually claiming to be the
14 trade dress.

15 The Tenth Circuit in the *Forney* case was very clear
16 that they have a duty to clearly articulate what their trade
17 dress is, and that's so that -- it's, A, so the court can
18 fashion an appropriate remedy; it's also so that people in the
19 industry, like our client, would know what, you know, is and
20 isn't off limits.

21 But they also fundamentally misconstrue the idea of
22 what a trade dress is. A trade dress is the overall look, the
23 total look of their product. It's not a little piece here, a
24 little piece there. Now, the courts are clear they can assert
25 the trade dress elements, the uniqueness or the distinctiveness

1 of trade dress elements, to just certain things, not the entire
2 product. But you still have to look at the entire product, the
3 totality of the circumstance to decide what they're talking
4 about.

5 So we have a moving target here. We also have
6 absolutely no consistency in the trade dress. They have these
7 same games, these three-reel mechanical games, in multiple
8 different cabinets, the same -- we'll use Mr. Money Bags
9 because it's their favorite. Mr. Money Bags is in what they
10 call a stand-up -- a C6 slant cabinet -- not slant -- an LS
11 cabinet, an upright cabinet. That's the one you saw the
12 picture of in the complaint.

13 They also have a sit-down version of it, a slant
14 cabinet. Same game, three-reel, Mr. Money Bags, not part of
15 the family, not the series. The same Mr. Money Bags, they have
16 it in a giant one that they have on the floor of the casinos.
17 They have it with nine different size screens that have
18 different artwork on each one of those. They have machines
19 that have -- the screens are smaller and have little tiny bingo
20 patterns in them which are part of their elements. They have
21 bigger screens that have big giant bingo patterns in a
22 different place. They have -- that's just for Mr. Money Bags
23 in the same casino, all right?

24 Across their line of machines they have -- you know,
25 they talk about the pay tables that they use. They have a

1 bunch of exhibits attached to the complaint -- I think it's
2 Exhibit 6 to the complaint -- where they show all the different
3 pay tables and they claim that we use the same pay tables,
4 putting aside the fact that those are industry-standard pay
5 tables.

6 If you look at the pictures submitted of various games,
7 sometimes they have them in the round top and sometimes they
8 don't. Sometimes they're in the belly glass, what they call
9 it, all right? So there's no consistency across their line.
10 Plus all those different permutations, we have an undisclosed
11 number of games that have this jukebox lighting option, okay?
12 Your Honor allowed in one of the motions one of the witnesses
13 to testify that the majority of their games don't have the
14 jukebox lighting, okay -- they say they don't track it -- at
15 least 50 percent. So somewhere less than 50 percent but almost
16 50 percent have this lighting which shows up in all their
17 pictures. It shows up in their marketing materials. It shows
18 up in their complaint.

19 They have a picture of something called "planetary
20 pigs" that has purple light around it. These same games have
21 the halo lighting in yellow, in red, in orange. So each game
22 is different. Some of them have toppers, the oval toppers as
23 opposed to our iPad topper. They have oval toppers, some of
24 them are round, some of them are square, some of them are
25 there, some of them aren't there. The point is, there's no

1 consistency, and without consistency there is no trade dress,
2 period. That's the end of the analysis right there.

3 Now, let's get into a little bit of the specifics of
4 what is actually articulated. In the amended complaint, which
5 I think controls frankly, not what's in their summary judgment
6 motion -- but we'll talk about that -- the summary judgment
7 opposition. The amended complaint -- oh, and I forgot to
8 mention that all those different elements of their trade dress
9 have changed consistently over time which the *Forney* court says
10 destroys the trade dress as well because it's not consistent.

11 Now, in the amended complaint and the original
12 complaint, because it wasn't changed, they talk about, one, the
13 game cabinets; two, the game play sounds; three, the award
14 sounds, which they define as the mechanical bell, use of a
15 mechanical bell; the bingo pay and plays, which they -- that's
16 where they attach the examples of the pay tables, which are
17 actually called "pseudopay tables," that appear in the round
18 top and other places on the machines; the red screens, which is
19 their bonus spins game where there's a film that goes over the
20 video screen. Again, remember, some of them are -- we're
21 talking about a six-inch rectangle, that's the screen, that has
22 a red film over it. That's the whole thing. Sometimes they
23 have a bigger screen where there's a red film on it. We're not
24 talking about even the new version that's changed as opposed to
25 what ours is. And they have various themes which they say are

1 part of the trade dress but they don't quite explain how.

2 Now, in the opposition for summary judgment -- and it's
3 our contention that they cannot amend the complaint through an
4 opposition to a summary judgment -- they talk about the cabinet
5 and they limit it to -- they've now limited it to the LS
6 cabinet so it's one out of five or six cabinets that they have.
7 Because those series of games, that Mr. Money Bags Goes to the
8 Beach, Mr. Money Bags Goes Shopping, whatever it is that they
9 have, all the endless versions, those are in three-reel,
10 five-reel, they're in video, they're in progressive machines,
11 those are in at least five different cabinets, all right? So
12 now they're limiting it to one specific cabinet, okay, which
13 they say -- you know, with two different screen sizes, which
14 now for the very first time in the entire case they're claiming
15 there's two separate lines they're talking about. Though,
16 quite frankly, they have never actually said in their
17 opposition which of the two lines, if any, we're infringing on.
18 I mean, I don't know how you can infringe on two separate lines
19 with the same image but that's what their argument is.

20 They say the court should just ignore the jukebox
21 lighting, pretend it doesn't exist, even though it's got this
22 huge deployment. And for the first time, they have not -- as
23 opposed to the complaint -- they have not limited their
24 description to three-reel mechanical games; they just say
25 "mechanical games." Well, they have five-reel games, they have

1 four-reels, three-reels. Some of them have this round --
2 another reel in the top. Same games with another reel on the
3 top. And that's for the first time. And that opens up,
4 frankly, a whole new front because there's a whole lot of
5 differences between the five-reel games and the three-reel
6 games.

7 The second thing they talk about is the red strobe,
8 they call it, the light that's on top of the cabinet. The red
9 strobe is not in the complaint, it is not in the amended
10 complaint, it's not there. They are now saying that's
11 something separate from the cabinet itself, this red strobe.
12 There's a lot of talk about it in discovery, and we can talk
13 about ours versus theirs, but it's not in the complaint.

14 They also now talk about the reel resolution sound as
15 opposed to in the complaint where they talked about the -- the
16 right word was the reel -- the sound of the reels spinning.
17 Now they're talking about the reel resolution. Not really sure
18 what a reel resolution sound is but I think I get from their --
19 whatever. It's noises that come out of the machine when the
20 reels stop. That's different from the reels spinning.

21 They talk about the award sound which is -- okay,
22 that's the mechanical bell. We get that. The bingo pay and
23 plays, that is a feature that's different in every single game.
24 They have different pay tables. They have different -- as far
25 as I -- my understanding is that for the games that are still

1 at issue, there's three, maybe four different actual pay
2 tables, what they call [REDACTED]. I'm not really
3 sure which ones are technically still in the case. But that's
4 how out of [REDACTED] pay tables that they have. So the bingo pay and
5 plays is different in every game, and so I'm not sure how that
6 can be a consistent trade dress across their lines but that's
7 what the allegation is. And the red screen free spins, which
8 ignores, like we said, the new versions and it ignores video
9 versions of it.

10 The point in all this is that they don't have a trade
11 dress. It's inconsistent. It's changed over time. *Forney*
12 says it's not a trade dress if it's not consistent and if it's
13 changed. You can't ignore the entirety of it. They can't
14 pretend that the jukebox lighting isn't there sometimes and not
15 there other times. They can't pretend that it doesn't have the
16 toppers.

17 Now, assuming they can pretend that this narrow version
18 that they like, because they think if you take away all these
19 other things, it looks the most like our machines or our
20 machines look the most like -- if you strip out all the other
21 stuff that makes it look different, then it looks similar.
22 That's their position.

23 So assuming there's some sort of trade dress there, the
24 next question the court needs to look at is functionality.
25 They have the burden -- the Supreme Court has said it

1 repeatedly -- of proving that their trade dress is
2 nonfunctional. It's the *Traffix* case. If the trade dress is
3 functional, nothing else matters. No matter how much they say
4 we copied it, we have the absolute right to do that, unless
5 they have copyright protection or some sort of patent
6 protection. If they don't have the trade dress or if their
7 trade dress is functional, copying doesn't matter. I'm not
8 saying we did copy. I'm just saying it doesn't matter because
9 that's the allegation.

10 Now, in the *Wal-Mart* case, the *Wal-Mart v. Samara* --
11 it's the seminal case in all this -- the court pointed out that
12 product design almost invariably serves purposes other than
13 source identification, which is what we're talking about here.

14 In the *Traffix* case, the Supreme Court said that to be
15 functional there's basically two tests. It has to be essential
16 to the use or purpose of the product or it affects the cost or
17 quality of it; or the second one is, exclusive use of the trade
18 dress would create a competitive disadvantage.

19 Now, I'm not going to go through, in the interest of
20 time, obviously how each element of their alleged trade dress
21 is plainly functional because their argument is that, well,
22 yeah, but if you put it all together, you know, you have to say
23 whether the totality of it is functional.

24 Well, I think the *Leatherman* case, which we cited in
25 the brief, Second Circuit case, hits it on the head when they

1 say that when an article is nothing more than a combination of
2 functional parts, it's functional.

3 Now, the key point in all this, I think, is when we're
4 talking about the totality of the machines. If Castle Hill
5 cannot use its games, which it has made in the style of classic
6 Las Vegas slot machines, then it's at a serious competitive
7 disadvantage.

8 We cited in the brief, in our opening brief, the
9 deposition testimony of Mr. Starr who at the time was the
10 executive vice president of VGT, executive vice president of
11 sales. He is their current president. What he said was that
12 the purpose of the design -- the purpose of their design is to
13 emulate the classic, traditional slot-gaming experience.

14 That's the key to what Castle Hill has done here.
15 That's the key to everything in this case. These are not slot
16 machines. They look like slot machines but they're not.
17 They're bingo games that are dressed up to look like slot
18 machines. They have this -- both VGT and Castle Hill have
19 tried to emulate this classic slot machine look, what they used
20 to call the "one-arm bandits." Of course they've gotten rid of
21 the arms but I'm sure you've heard the expression, okay? This
22 classic, old-time, Las Vegas look.

23 So Castle Hill uses what they call the "classic retro
24 cabinet," which VGT does too, which several other people in the
25 industry use, all right? We buy them used, all right? So

1 that's how common they are. Now, they're retro -- the reason
2 they're called "retro" is because they're this classic look,
3 the shape, the round top.

4 These machines are three-reel mechanical games, meaning
5 they have spinning reels. Reels have absolutely nothing to do
6 with the game of bingo, nothing. They call it an entertaining
7 display, all right? It's all an illusion to make you think
8 that you're playing an old-time slot machine, a classic,
9 old-time slot machine.

10 VGT uses in its pay tables -- it's now completely
11 undisputed that those pay tables that are attached to the
12 complaint as pictures are the same pay tables that they took --
13 that were used by a company called "IGT" for decades. They are
14 standard industry pay tables, okay? There's no dispute about
15 that. They come from something called "Double Diamond" and
16 "Double Triple Cherry" or something like that. [REDACTED]
17 [REDACTED]. That's not in dispute,
18 okay? So they're using these classic pay tables so that people
19 have this familiarity to the classic games that they always
20 used.

21 The other issue is the mechanical bell. Why on earth
22 do people use a mechanical bell in the age where my phone can
23 remake any ring tone in the world? Because they're trying to
24 emulate the classic, original, one-arm bandit look and feel of
25 these games. They have bonus spins because that's how the

1 classic games already did it. They have ubiquitous themes.
2 It's no longer in dispute. They sort of gave up on all the
3 theme business a long time ago, that money is ubiquitous
4 themes, that gems and gold and mining, these are all things
5 that are used throughout the machine's history, throughout the
6 gaming history. That's what people do. They expect to -- it
7 came from Double Diamonds. All of these things have diamonds
8 on them, okay?

9 So the point is, the functionality of the whole -- the
10 gestalt of the whole thing is the classic Las Vegas gaming
11 experience and that's what would -- the functionality of this.
12 It's not because -- yeah, you could use a million other things.
13 You could, instead of using the mechanical bell, yeah, we could
14 use a ring tone from Apple or whatever. But the point is that
15 they're trying to make an experience or make the player
16 comfortable with what they've been playing for years, which is
17 this classic slot machine thing, when it's not a slot machine.

18 Now, if -- and let me know if I'm going to fast, Your
19 Honor. I'm trying to move it along for you here. If, and only
20 if, the court finds that there's a consistent trade dress, and
21 if, and only if, the court finds that they've established that
22 it's nonfunctional does the court need to get to secondary
23 meaning, okay? And they need secondary meaning.

24 They have pretended in their opposition that this is
25 product packaging and not product design. I can spend some

1 time on it, if you want. The Supreme Court says if it's
2 product packaging -- I mean, if it's product design, they must
3 prove secondary meaning. I think it's not even a close call.
4 If Your Honor thinks it's a close call, then the Supreme Court
5 says the court has to assume it's product design and apply. So
6 I'm not going to spend a whole more time on there unless the
7 court has specific questions on that.

8 Just on that, I will note that in the complaint, the
9 amended complaint itself, right before paragraph 16 of the
10 amended complaint, they have something -- a title that says
11 "VGT's Products," okay, the products. Then in paragraph 16,
12 they describe -- all of its products are categorized as, quote,
13 Class II bingo-based player terminals. It's the terminals.
14 It's this entire machine that's the game. It's the interface.
15 It's three-reel mechanical. It's the bonus spins which is part
16 of their game. It's the game play sounds. It's the playing of
17 the game. It's not -- it's not a box. In any event, if
18 there's any doubt, the Supreme Court says you have apply
19 secondary meaning. Again, we don't think it's a close call on
20 secondary meaning either.

21 Mr. Gill talked about direct versus circumstantial.
22 I'm not going to spend any time talking about the Wind survey
23 because I don't think it's worth talking about. I'm not going
24 to spend -- unless the court has any questions. And the same
25 thing with the actual confusion evidence, I don't think there's

1 anything there. But --

2 THE COURT: If the court determines that VGT has
3 submitted sufficient evidence of Castle Hill's intent to pass
4 off products as those of VGT, couldn't a reasonable fact-finder
5 find that VGT's trade dress had acquired a secondary meaning?

6 MR. PLATT: They would need to show an intent to
7 confuse, not an intent to copy the product. I think the *Forney*
8 case and the *Water Pik* case are pretty clear on that; right?
9 Intentional copying, there's nothing wrong with intentional
10 copying. The question is unless it's copying -- you know,
11 patented or copyrighted or -- the question is whether or not
12 there is an intent to deceive the public.

13 So if your question is, if the court finds that there's
14 an intent to deceive the public into thinking that these games,
15 notwithstanding the prominent house marks and the different
16 looks and the fact that we put a rectangle topper on top of
17 theirs and we have a different light than theirs and so forth
18 and so on --

19 THE COURT: Well, your light isn't that different.

20 MR. PLATT: I'm sorry?

21 THE COURT: Your strobe on the top is not that
22 different; correct?

23 MR. PLATT: Well, you haven't seen them. Granted,
24 you saw their pictures, okay? First of all, ours have a white
25 layer and theirs has a red and white --

1 THE COURT: Are you making -- are you making an
2 argument that since I haven't seen them, I need to deny all the
3 motions for summary and have the trial?

4 MR. PLATT: Well, it's their evidence. I mean, it's
5 their burden to establish it but --

6 THE COURT: Well, but you're moving for summary
7 judgment --

8 MR. PLATT: And we have -- and what we have in the
9 record is that theirs is an incandescent light, ours is a LCD
10 light. Ours has a white level, a candle really, I mean, it's a
11 candle with a strobe on top. They're different. It's just one
12 of the elements, okay?

13 THE COURT: Same manufacturer; right?

14 MR. PLATT: Same manufacturer, yes. Philips makes
15 lots of different light bulbs too.

16 THE COURT: Good point.

17 MR. PLATT: The bell is from the same manufacturer.
18 They're different sizes. They're different, you know, voltage.
19 They're different.

20 Now, the other thing that they have to do, though, is
21 find secondary meaning for -- you know, if they -- when they're
22 trying to prove it through their ad revenue and through their
23 marketing, they need to show that the ad revenue and the
24 marketing is all directly related to the marks themselves, to
25 the trade dress themselves. What they've produced is a lot of

1 evidence that they have a guy dressed up like Mr. Money Bags
2 that goes around and they push, you know, the different names
3 of their characters. There's some evidence that they pushed
4 the red screens. They think people like that term, "red
5 screens," okay?

6 Again, the trade dress is the gestalt, it's the total
7 look of the machine. There is nothing in the record tying the
8 total look of their machine, absent, you know, in the version,
9 the specific version, that they're talking about here, not all
10 their Mr. Money Bags machines. The Mr. Money Bags machine
11 that's in this particular cabinet without the lighting, without
12 the topper, that has -- all right. They don't have anything
13 tying specifically to that trade dress, to the extent the court
14 finds that that could be a trade dress, but we obviously don't
15 think they can.

16 So they've also changed, as we said, over time the size
17 of the machine and their trade dress has changed. The Tenth
18 Circuit in *Forney* says that when you change it over time, you
19 can't prove secondary meaning because it doesn't have a
20 consistent, over time appearance, it destroys secondary
21 meaning.

22 So as far as likelihood of confusion, we think there's
23 little similarities. The cabinets are generic. They're
24 widespread. Again, I don't have to go through -- we have the
25 toppers. They have the lighting. I mean, I think they all

1 I look very different. We have the house marks, which think
2 about where it is in that curved top, all right, the round top.
3 It's at eye level when you're sitting there, okay, or when
4 you're standing there. You walk by, that is at eye level. So
5 if you're looking at machines one by one, it's right there,
6 okay?

7 Granted, Mr. Money Bags, who doesn't like it's very
8 prominent when it's in black and white or color in the papers,
9 but when you have a machine with lights on it's a prominent
10 thing and people see it and there's no -- it's there and we
11 can't pretend that it's not there.

12 As far as other differences, you know, like I said, we
13 have different lights, the different bells, our cabinets have
14 different dimensions. But a critical one, I think, is the red
15 screens because they put a lot of emphasis on that. Again,
16 they have this red film that goes over their little six-inch
17 box or the bigger one. Ours is a video, it plays a movie that
18 says "instant free pay" across it with stuff going on like
19 that. Our reels turn red, the whole machine turns red, and
20 starts doing stuff, okay? It's night and day, night and day.

21 I understand they're upset about it because -- the
22 reason they're upset about it is because the president of their
23 company testified -- and what was referenced earlier -- that,
24 well, [REDACTED]

25 [REDACTED]. And then ultimately on

1 the last day of discovery, they admitted that [REDACTED]
2 [REDACTED] which was, we said, August of this year -- of last
3 year, all right? So they've now changed their trade dress
4 again because they want what we have. That's why they're
5 upset, not -- there is no comparison to their red screen to our
6 "instant free pay." They're completely different.

7 Again, on intent to copy, your question before, our
8 intent was to compete, to compete by emulating the classic slot
9 machines experience. It's not by trying to make people think
10 that they're playing VGT games. They were trying to get them
11 to think that they're playing classic slot machines. There's a
12 bunch of -- in those discredited surveys that VGT did over the
13 years, most people don't have any idea they're playing bingo,
14 they think they're playing slot machines. I think that's a
15 fair assumption. I know I've played them. I forget I'm
16 playing bingo. You got reels spinning.

17 That's the experience that we're trying -- that the
18 company is trying to emulate, not trying to make people
19 think -- and to compete in that space head on with VGT, yes,
20 that is our intent. We intend to have more customers play our
21 games than theirs because we think they're better games. But
22 it's the same style of game. That's where we're competing and
23 that's where we're entitled to compete.

24 And along that line, regarding what Your Honor asked
25 before, in *Water Pik* itself on page 1157 the Tenth Circuit

1 said, "When we have said that evidence of intent to copy may
2 justify an inference of confusion, we have been referring to a
3 particular mark, not copying a competitor's product." And I
4 think that's what's critical here.

5 We've already talked about the evidence of actual
6 confusion. The casino customers, whether they're sophisticated
7 or not, we've talked about that. VGT admits that their
8 customers are the tribal casinos. Do the players, you know,
9 casino-goers play the games? Yes. But the relevant customers
10 from VGT's mouth is the tribal casinos. They're the ones that
11 lease the games. They're the ones that decide what goes on the
12 machine. They're the ones they have to deal with on the
13 amount. They're the ones who care what style it is. They're
14 the ones that want the classic -- the ones that look like
15 classic machines because they know what their customers --
16 their customers pay who want to play.

17 And as far as the strength of their trade dress, it's
18 weak. I mean, the secondary meaning is a sliding scale.
19 There's a threshold you have to get to to secondary meaning,
20 but since we don't think they can get there, I really don't
21 think you can say that it's strong. I mean, it's just a
22 routine cabinet in a sea of other routine cabinets.

23 And if Your Honor has no other questions, I think
24 that's about all I want to say on this.

25 THE COURT: So I'm looking at *Forney* here and your

1 reference to changing over a period of time. You don't contest
2 that VGT can properly -- I know you are saying that this is a
3 traditional cabinet, lots of people with traditional cabinets.
4 But you're not contending that they can't select a subset of
5 their machines and contend that those are the proper focuses of
6 a trade dress claim; correct?

7 MR. PLATT: No, I disagree. I think they can't --
8 they can focus on specific elements that they think are unique
9 or distinctive, if we're going the distinctive route, about
10 their products as opposed to everybody else's, but you still
11 have to look at the overall total machine.

12 THE COURT: Correct, correct. But they can --

13 MR. PLATT: So they can claim just A, B, and C and
14 then you can decide whether A, B, and C, given that the entire
15 thing, you know, has all these other things, you know, is
16 enough. So they can articulate it that way, but whether that's
17 enough, I don't think so. I don't think it makes it
18 distinctive enough. I don't think it's something that's
19 recognizable that they've even pretended to get secondary
20 meaning on, the entire -- this very narrow, specific
21 permutation of a subset of all these games that are on the same
22 casino floors.

23 I mean, to say it's not -- you know, in one sense
24 they're saying we really have 22 products out there, 22 product
25 lines of the same game, and you should ignore them all and just

1 focus on this one. But if you do that, then they don't have a
2 trade dress because they have all -- they have 20 different
3 versions of the same thing in the same store -- in the casino.
4 You know what I mean. So that's why they don't have a trade
5 dress.

6 THE COURT: All right. Thank you very much.

7 MR. PLATT: Thank you, Your Honor.

8 THE COURT: Mr. Platt.

9 MR. ROMAN: It's Mr. Roman, sir.

10 THE COURT: I'm sorry.

11 MR. ROMAN: Unless you want more of Mr. Platt.

12 THE COURT: Mr. Roman. I'm sorry.

13 MR. ROMAN: I don't want anymore from Mr. Platt.

14 THE COURT: No, sir. Go ahead.

15 MR. ROMAN: Your Honor, may I please hand up the
16 printout of our PowerPoint presentation?

17 THE COURT: Please.

18 MR. ROMAN: Okay. Also to your law clerks?

19 THE COURT: Thank you.

20 MR. ROMAN: And, Your Honor, I really like our
21 PowerPoint presentation. I'm not going to go through the whole
22 thing. I don't think it's fair to keep everybody here for
23 that. But I would urge the court to go through it.

24 I guess I'd like to start with the principle that seems
25 to have been ignored by Castle Hill. It's the overriding

1 principle on this motion and it's set forth in *Sally Beauty* and
2 the other Tenth Circuit cases, and that is that summary
3 judgment is almost never granted in trademark and trade dress
4 cases and that's because each element of those claims is so
5 fact-intensive. You've heard from counsel and they say that,
6 you know, the marks don't look at all the same. We obviously
7 are going to take a contrary position and it's going to be up
8 to Your Honor to choose, but I don't believe it's an
9 appropriate time to do so in the motion for summary judgment.

10 THE COURT: Believe me, this has gone through my
11 mind as to whether or not this is just a dress rehearsal to
12 acquaint me with some of your arguments. Because as I
13 mentioned to you before, you know, to the extent that one has
14 to look at the entire gestalt, looking at these things by
15 reading briefs doesn't get a fact-finder there.

16 MR. ROMAN: And Your Honor, in the limited time --
17 and I don't want to keep the court staff here longer than
18 necessary -- the limited time I have what I'd like to do is go
19 through the marks to kind of give you that preview and then hit
20 of some their main points and then call it a day, if that's
21 okay.

22 So let's start with the similarity of the marks, Your
23 Honor. You know, Mr. Gill took me to task again today for not
24 setting out in our briefs a narrative description of the trade
25 dress at issue. But, you know, as they say, a picture is worth

1 a thousand words. Here on the left is VGT's Mr. Money Bags
2 machine and on the right is the Castle Hill New Money machine.
3 It's the same type of Class II, three-reel mechanical game,
4 similar cabinet, nearly identical red strobe at the top made by
5 the same company, Seco-Larm, similar artwork, the same bingo
6 patterns with the similar payouts.

7 Now, let's go to -- I want to play the sounds for Your
8 Honor. Let's go to -- I hope it works. We did it in dress
9 rehearsal here. Okay. So we have -- this is the real
10 resolution sound, Your Honor. This is what happens when they
11 -- oh, shoot -- when the reels come to a close. Here we go.
12 This is VGT's.

13 *(Sound played)*

14 MR. ROMAN: Would you like me to play that again,
15 Your Honor, or --

16 THE COURT: No, that's fine.

17 MR. ROMAN: And here's Castle Hill's.

18 *(Sound played)*

19 MR. ROMAN: Okay. Then here's the award sound.
20 Again, the same bell from the same company -- or a similar
21 bell, I should say, from the same company. This is the W.L.
22 Jenkins bell. This is what happens when you win. This is VGT
23 first.

24 *(Sound played)*

25 MR. ROMAN: And here's Castle Hill's.

1 (Sound played)

2 MR. ROMAN: Okay. So then you also, Your Honor,
3 have the same pseudoplay tables. It's VGT on the left, Castle
4 Hill on the right. They're generally in the same position at
5 the top of the cabinets. You have the same bingo patterns.
6 And here, Your Honor, you see the private stripes pattern used
7 by both of them. It's one of many patterns they use in common.
8 The payouts are similar.

9 THE COURT: In terms of those tables, Mr. Platt had
10 argued that these are traditional pay tables, that they've been
11 in place for a long time, multiple manufacturers. So you're
12 just focusing on --

13 MR. ROMAN: No. And we would not be claiming on
14 just the pay table, Your Honor. It's just one more factor
15 that's similar or the same.

16 And I did not do the red screen free play -- where did
17 that go? Here we go. So this is the red screen free spins.
18 First VGT.

19 (Sound played)

20 MR. ROMAN: That was a happy customer. Okay.
21 Here's Castle Hill.

22 (Sound played)

23 MR. ROMAN: So not everything, Your Honor, is
24 identical. It doesn't have to be. And the Tenth Circuit made
25 it plain in *King of the Mountain* that the court is to give

1 weight more to the similarities than to the differences.

2 And then I guess one last point. We talked about the
3 house marks. I guess -- here they are in terms of the
4 prominence and whether they're a distinguishing feature and I
5 gather it does differ from game to game. And we did not mean
6 to just take the one where it's the least obvious, but we chose
7 the Mr. Money Bags because [REDACTED]. You can
8 see that the house mark is not just small but obscure on both
9 the VGT and the Castle Hill machines.

10 Now, this is not an accident, Your Honor, and this goes
11 to the intent point. By the way, *Sally Beauty* makes plain --
12 and this is particularly relevant here, Your Honor -- that
13 intent to copy -- not intent to deceive -- but intent to copy
14 standing alone may be enough to preclude summary judgment. And
15 we submit, Your Honor, that we have intent to deceive, but just
16 intent to copy is enough to defeat summary judgment. Virtually
17 everything Castle Hill has done has been modeled after VGT.

18 Let me start --

19 THE COURT: Now, you're just focused for the moment
20 on the register mark?

21 MR. ROMAN: Well, it's -- no, it's everything, Your
22 Honor, as you'll see. Let's start here on the screen where we
23 have -- there are two documents. These are both from Castle
24 Hill documents. But the product hardware strategy, this is a
25 Castle Hill strategy document and talking about creating a

1 familiar player experience with cabinet interface, color
2 scheme, and feature set that is easily recognizable and
3 familiar in the marketplace. We have deposition testimony
4 tying that to VGT.

5 And actually, it's interesting, Your Honor. They talk
6 -- Mr. Platt was talking about that the intent was to make
7 classic -- I wrote this down -- classic slot machines. That
8 doesn't appear in any of their documents. What appears in any
9 of their documents is what appears in the next section here on
10 retro cabinet, where all doubts as who they're copying is made
11 plain where it says what type of retro cabinet they're making?
12 VGT style.

13 In fact, you see throughout their documents, Your
14 Honor, there are all these references to VGT. No reference --
15 or maybe no. I don't want to go that far. But I believe that
16 there are either one or two or no references to any other
17 manufacturer, it's all VGT, and it's not to classic slot
18 machines.

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

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[REDACTED]

And, Your Honor, to the extent that there is an issue about whether it is intent to copy or intent to deceive, at best -- at best -- that's a credibility issue, a fact issue, and at this stage all doubts are to be resolved against Castle Hill.

And, again, the Tenth Circuit in *Sally Beauty* wrote, "One who adopts a mark similar to another already established in the marketplace does so at his peril because the court presumes that he can accomplish his purpose; that is, that the public will be deceived. All doubt must be resolved against him."

Now, the intent to copy or deceive -- well, actually let me go first: There is some -- okay. Let's go there. So clearly it worked. We talked about actual confusion and Your Honor has admitted two forms of the -- the two core forms of actual confusion, the survey, the consumer survey, and the anecdotal evidence. Those are going to be -- those will be -- that evidence will be presented at trial.

1 Now, I know that Your Honor has expressed concerns
2 about the --

3 THE COURT: The Wind?

4 MR. ROMAN: -- about the Wind survey. We intend to
5 allay those concerns at trial, but for now it will be
6 introduced pursuant to Your Honor's order and it is evidence of
7 actual confusion. In fact, it's more than twice the amount of
8 confusion needed -- that the courts have typically required.

9 As with respect to the anecdotal evidence, we will have
10 14 evidences of actual confusion, and I believe can it's either
11 seven or eight of those involve consumers. That's a big
12 number. Fourteen's a big number. It's especially a big number
13 given the difficulty of finding such evidence. It occurred in
14 a relatively short time when Castle Hill has had a limited
15 presence in the market. Because the games are so similar, the
16 players may not realize they're confused. Even if they do
17 realize they're confused, because the games cost so little --
18 some of these games cost as a little as a quarter to play --
19 they may not complain.

20 In fact, that's a phenomena that was recognized by the
21 Tenth Circuit in the *Brunswick* case. They just say they may
22 just go avoid the product, which, of course, is a terrible
23 outcome and one of the ones that's at the core -- one of the
24 core concerns of the trademark clause. And even those players
25 who realize they're confused and complain will do so to the

1 casino employees, not to the manufacturers. Nobody's going to
2 call VGT up and, you know, complain about a bad Arctic Cash
3 game, they're going to go complain to the casino.

4 And what's worse, Your Honor, is not only is there this
5 confusion out there -- and you saw -- I think you've ruled
6 specifically on these two -- on these two posts that are up
7 there, social media posts, one where a consumer -- one consumer
8 says that, looks like I need to come play some VGT, and he's
9 corrected, said, no, no, no. It's Castle Hill, CHG.

10 And then there's another -- the one on the right, Your
11 Honor, is a reference -- the consumer says that it looks
12 like -- look at these VGT \$1 machines. That's at a casino
13 where there are no VGT machines; they're Castle Hill machines
14 there. And what's worse, Your Honor, is Castle Hill's aware of
15 this confusion and they find it amusing. It's a joke between
16 Mr. Starr and Mr. Milligan.

17 Now, with respect to -- let me step back for a moment,
18 Your Honor. You know, as Your Honor's well aware, the test is
19 not actual confusion; the test is likelihood of confusion.
20 But, of course, the best evidence of actual confusion --
21 likelihood of confusion is actual confusion because if it's
22 actually happening, it's hard to argue that it's unlikely to
23 happen.

24 Castle Hill argues that it should be disregarded as de
25 minimis, the number of instances. But it's important to bear

1 in mind the limited instances in which courts dismiss evidence
2 of actual confusion as de minimis. There are basically three
3 circumstances: Where the products aren't similar, it's not the
4 case here; whether the defendant has put on substantial
5 evidence demonstrating no confusion, no evidence here, no
6 survey here; and there are other reasons to discount, such as,
7 you know, from people not familiar with the industry or
8 isolated instances, and, again, not the case here.

9 We are not aware of any case in the Tenth Circuit that
10 has ever held that more than seven instances, let alone
11 fourteen instances, are de minimis. In fact, you know, the
12 Tenth Circuit in the *Big O Tires* case held that a dozen
13 instances was not de minimis, and the Court of Appeals in
14 *Brunswick* held that one instance -- even one instance may be
15 worthy of consideration if it's the right type of confusion.
16 And there, the consumer sent the reel to the wrong manufacturer
17 for repair. I just have to note that was a Zebco reel and that
18 was my very first fishing reel, a closed-face reel that I
19 caught a lot of smallmouth bass on it.

20 THE COURT: Made here in Tulsa, Oklahoma.

21 MR. ROMAN: And a good reel it was.

22 So there's some question that was raised at the
23 beginning about what exactly we're claiming and whether it's
24 been shifting or not. And actually it's interesting. First of
25 all, we did set forth clearly in the amended complaint, and I

1 was really taken aback when there was an allegation or there
2 was an assertion made in the Castle Hill's presentation that we
3 haven't set it forth in any detail. I believe they complained
4 that our interrogatory responses, where we set out -- specified
5 the trademarks and trade dress at issue, I think they said it
6 was too lengthy, they complained it was too long. So, you
7 know, damned if you do, damned if you don't.

8 But anyway, to make clear what is at issue here, this
9 is the trade dress that's at issue. There's six elements.
10 There's the game cabinet, the red strobe at the top, the reel
11 resolution sound that we heard, the award sound that we heard,
12 the bingo pays and plays, and the red screen free spins. Those
13 six elements in combination, no one in isolation, but all six
14 in combination are the trade dress at issue.

15 The trademarks at issue, there are four series of games
16 in which we are -- on which we are basing our claims: Crazy
17 Billions, Mr. Money Bags, Polar High Roller, and Greenback
18 Jack. Within those trademarks, there are -- within each series
19 of those, there are four types of marks for which we seek
20 protection: the word marks, the logo marks, the artwork on
21 each panel, and then the characters.

22 And then here are the Castle Hill games with the VGT
23 analogs right next to them. So on the left-hand side of each
24 of these, you have the VGT game, and on the right you've got
25 the Castle Hill game. So I think the first one is Crazy Bill,

1 which is a VGT game, and then Welcome to Nugget Mountain on the
2 right. You've got Mr. Money Bags on the left and New Money on
3 the right. You've got Polar High Roller on the left and Arctic
4 Cash on the right. And then you've got -- what is this one? --
5 Coin Slingers on the right and Greenback Jack on the left.

6 So let me talk a moment, if I could, about secondary
7 meaning.

8 THE COURT: Before we do that --

9 MR. ROMAN: Sure.

10 THE COURT: -- you used the term "series" and we've
11 picked up on this doctrine of family of marks. Are you
12 invoking that doctrine of family of marks?

13 MR. ROMAN: Well, I'm unfamiliar with that precise
14 concept. I think I agree with it, that, Your Honor, it's not
15 just -- it's not just Mr. Money Bags, but there are brand
16 extensions and they are -- we seek protection on all of those.
17 There's a whole -- there is, I guess, a family of Mr. Money
18 Bags marks.

19 THE COURT: All right. Does VGT have authority for
20 the proposition that the court can consider the marks as a
21 series? And just to be clear, are you talking about all of the
22 Mr. Money Bags games or just the classic one?

23 MR. ROMAN: Well, it's all the Mr. Money Bags games
24 that are -- well, for the marks, yes, all the Mr. Money Bags
25 games. Now, I would like to have an opportunity to provide you

1 with authority, if I could, Your Honor.

2 THE COURT: Let me ask here: Aside from whether the
3 court will grant partial summary judgment or not, it's my
4 understanding then that VGT will at least concede that its
5 trademark claims as they now stand are limited to Mr. Money
6 Bags as the sole registered trademark claim and then the
7 unregistered trademark claims premised on four series,
8 Mr. Money Bags, Polar High Roller, Crazy Bill, and Greenback
9 Jack?

10 MR. ROMAN: That's correct, Your Honor.

11 THE COURT: All right. Secondary meaning.

12 MR. ROMAN: Secondary meaning. So, first of all,
13 Your Honor is correct when you asked counsel for Castle Hill
14 about the -- I don't know whether you were quoting from *Sally*
15 *Beauty* or not -- but proof of an intent to copy, which we have
16 here, is enough to show secondary evidence -- secondary
17 meaning. I'm sorry. So that should end the matter right
18 there.

19 Also, Your Honor, secondary meaning comes into play
20 only if the court finds that the marks and trade dress at issue
21 are not inherently distinctive, and we submit that they are,
22 Your Honor. I'm sure Your Honor is aware of the categories of
23 distinctiveness. Here, they are listed from least distinctive
24 to most. We suggest that the VGT trademarks and the VGT trade
25 dress are arbitrary, that they are -- they don't describe

1 anything. I'm sorry.

2 So secondary meaning or acquired distinctiveness comes
3 into play only with respect to descriptive marks. The VGT
4 trademarks and VGT trade dress don't describe anything. They
5 are -- they are things that are arbitrary, they're pulled out
6 of the air. So it's not -- it's not -- we don't even have to
7 get there.

8 If we do get there, here are the factors for acquired
9 distinctiveness. They're all set forth on this page and we
10 submit that, frankly, all of them apply. We've already talked
11 about actual consumer confusion. We've talked about
12 intentional copying. The length and manner of use, the VGT
13 marks and trade dress has been in use for years and years and
14 years, sometimes more than a decade. VGT has spent -- has got
15 unbelievable sales success, [REDACTED] of dollars in sales. It's
16 the dominant EGM provider in Oklahoma, which in turn is one of
17 the largest Class II markets in the United States. That
18 results from having spent [REDACTED] in advertising,
19 including by promoting characters such as Mr. Money Bags and
20 the red free -- screen free spin feature. Say that five times
21 fast.

22 I guess let me finish off, Your Honor, with the trade
23 dress issues, the issues that are unique to trade dress.
24 Actually, let me just -- so, Your Honor, the reason why we
25 treat the trademark and the trade dress claims together is

1 because the first two -- the first two elements overlap. It's
2 ownership of distinctive trademarks and trade dress and
3 likelihood of confusion with those trademarks and trade dress.
4 The trade dress adds really only one element, and that is that
5 you have to show that the trade dress is not functional.
6 Mr. Platt's correct that the burden is on VGT to show that.
7 Mr. Platt also -- so he's right about that. What he's wrong
8 about is he says that we also need to show that the trade dress
9 is consistent.

10 As far as we are aware, no court in the Tenth Circuit
11 has ever adopted this requirement but it doesn't matter because
12 VGT's trade dress is consistent. It's well settled that VGT
13 gets to define the trade dress elements at issue and, as I said
14 earlier, we have those six elements.

15 Let me go to the functionality point. So there are
16 basically -- so functional here does not mean that the trade
17 dress serves a function. So in that respect, it's a misnomer.
18 Trade dress is functional in only one of the following
19 circumstances: It's essential to the product's ability to
20 function; it's the cheapest or best way of designing a product;
21 or the exclusive use of the trade dress would put competitors
22 at a nonreputational competitive disadvantage. The easy answer
23 to that question is, if the VGT trade dress is functional, why
24 do all the games from all the other competitors look so
25 different from VGT's?

1 But in any event -- here, we'll go through them.
2 Again, it's not essential or the cheapest or the best way to
3 make the games. There are all these alternatives. And, again,
4 at a minimum, Your Honor, these are fact issues. But here's
5 some -- here's some alternative ways. These are third-party
6 games, games made by other manufacturers, that look nothing
7 like the VGT machines, that look nothing like the Castle Hill
8 machines. There are two -- I think there are two panels of
9 those.

10 And, in fact, Castle Hill's expert, Mr. Valandra,
11 confirmed that there's no functional advantage to the way VGT
12 has made its machines. And we're still waiting, but Castle
13 Hill has not identified any third-party game that uses trade
14 dress features more similar to VGT's trade dress than Castle
15 Hill, let alone the same combination of features.

16 And then finally, Your Honor, you know, again, although
17 consistency of trade dress is not required in the Tenth
18 Circuit, I'd like to address that as well. The question, Your
19 Honor, is whether the products within the product lines are
20 themselves relatively consistent? Identity of appearance is
21 not required. And that's from the *Rose Art* case. In fact, I
22 think we got criticized for citing the *Rose Art* decision, which
23 is out of the circuit. The reason there are no cases within
24 the circuit is because consistency is not a requirement in the
25 circuit.

1 Slight variations do not render trade dress
2 inconsistent so long as the trade dress conveys a single and
3 continuing overall commercial expression. And that's why Coke
4 can make modifications to its bottle, can sell Diet Coke, can
5 sell it in bottles, sell it cans. Everybody knows it's Coke.
6 It's why Mickey Mouse can change over the years. Everybody
7 still knows it's Mickey.

8 It's enough that consumers see a machine and because of
9 the combination of elements associated with VGT. And here are
10 some examples of VGT's six-inch screen games that show
11 different artwork but, again, a single, continuing, overall
12 commercial expression. Here's one, and then here's some of the
13 same thing with the 19- and 20-inch screen games.

14 These images makes clear the differences are slight and
15 players would clearly recognize that these games all come from
16 the same manufacturer.

17 Unless Your Honor has questions, I think I'll stop
18 there.

19 **THE COURT:** Let me ask: Does VGT have any authority
20 to support its contention -- and I've discussed this previous
21 with Mr. Platt -- for its contention that the conclusive
22 presumption that the relevant registered word marks are
23 inherently distinctive should apply equally to the unregistered
24 word and design marks that include such registered word marks?

25 **MR. ROMAN:** I think, Your Honor, it follows from

1 established trademark principles, but I do not certainly off
2 the top of my head have a case that stands for that
3 proposition.

4 THE COURT: I notice there was very little
5 discussion -- I don't mean to extend this unnecessarily -- but
6 there was very little discussion in the briefing of alleged
7 trade secret claims that were premised on, quote, the
8 functionality for translating bingo outcomes into outcomes on
9 game reels.

10 MR. ROMAN: That would be Mr. Swanson, Your Honor.

11 THE COURT: All right. Let me see if there's
12 anything else. And in terms of relevant consumers?

13 MR. ROMAN: Oh, yes. Thank you, Your Honor. So I
14 think the -- two points on that, Your Honor. First of all,
15 there are two classes of consumers here. One is the direct
16 consumers, who are the casino operators, but then the ultimate
17 consumer, Your Honor, is the consumer patrons who's, of course,
18 the -- the casinos are going to under Mr. Gill's reverse ATM
19 theory, you know, they're going to stock the games that the
20 players are playing.

21 And it's important in this respect to bear in mind --
22 and I think we cited the TTAB decision in our brief, Your
23 Honor, for the proposition that the relevant degree of care is
24 that of the least sophisticated consumer, who in this case
25 would be that player who is stuffing dollar bills into the

1 reverse ATM.

2 THE COURT: All right. And is the trade dress claim
3 limited to three-reel mechanical games?

4 MR. ROMAN: So that's a good question, Your Honor.
5 When we filed the complaint, Castle Hill was making only
6 three-reel mechanical games and we asserted that all of Castle
7 Hill's games were infringing our games. Since then, they've
8 started making five-reel mechanical games so we believe that
9 those are now in play.

10 THE COURT: All right. Trade secrets. Oh, we need
11 to take a short break for our court reporter. And before we do
12 that?

13 MR. GILL: Well, Your Honor, Mr. Platt and I would
14 like a brief opportunity to respond to Mr. Roman's comments as
15 well.

16 THE COURT: All right.

17 MR. GILL: Which we understand that would be after a
18 break. But I just didn't want to sit here silent --

19 THE COURT: Let's take a short recess.

20 *(Short break)*

21 THE COURT: Mr. Gill.

22 MR. GILL: Yes, Your Honor. I will be brief. And
23 actually, I will speak as to the trademark and trade dress
24 issues, so I'll cover both mine and Mr. Platt's issues, and I'm
25 going to work backwards.

1 With regard to the trade dress issues, the argument in
2 the plaintiff's papers were that they've now reduced their
3 trade dress claim to two different lines of trade dress. They
4 said today that there's no requirement in this circuit that
5 there be a consistent trade dress among different lines, yet
6 they themselves in their papers said we've now reduced our
7 claim to two lines of trade dress. And they also cited the
8 *Rose Art* decision from out of this circuit for the authority
9 that if you have multiple lines of products, you've got to have
10 consistent trade dress among them in order for it to be
11 protectable.

12 The Tenth Circuit, while not addressing that issue
13 directly, has certainly not addressed it and said there's no
14 need to have consistent trade dress among multiple lines; they
15 just haven't addressed the question that we know of. The Third
16 Circuit's addressed it, the Second Circuit's addressed it, and
17 they both said you must have consistent trade dress if you have
18 multiple lines of product. So to be clear, the Tenth Circuit
19 hasn't looked at that issue and taken a pass on it; they just
20 have not had a chance to address it to our knowledge.

21 One of the things that you experienced in the
22 presentation from Mr. Roman is the comparison of photographs of
23 the plaintiff's games and the defendants' games and these were
24 side-by-side comparisons. But we can't help but point out to
25 you that under the law of this circuit, and under the law of

1 every other circuit that I know of, side-by-side comparisons
2 for trade secret -- trade dress analysis rather -- is not
3 permissible. You need to look at the market. You can't look
4 at just the plaintiff's games and the allegedly infringing
5 games in order to perform that analysis yet. That's exactly
6 what Mr. Roman did. And with regard to the plaintiff's
7 statements about there being two lines of trade dress, in his
8 argument this afternoon we only heard about one line of trade
9 dress. So what happened to the other line?

10 With regard to the trademark claims, the common law
11 trademark claims, it's interesting that the plaintiff produced
12 this PowerPoint presentation and used it for Your Honor, and on
13 page 8 there's a depiction of some artwork that relates to the
14 claims. But even after summary judgment briefing, even after
15 an amended complaint, and even after the PowerPoint
16 presentation this afternoon, we still don't have a complete
17 description of exactly what it is the plaintiff is claiming as
18 part of its common law trademarks.

19 We have on page 8 of this PowerPoint presentation the
20 statement that they have four series of games -- the Crazy
21 Bill, Mr. Money Bags, Polar High Roller, and Greenback Jack --
22 and we have images from each of those games, but we don't have
23 images even from all of those games in the series, in the
24 various series. All we have is what is supposed to be a
25 representative sample, but in fact the artwork for these

1 various games is all different, the artwork on the various game
2 extensions is different. So even now after the amended
3 pleading, after summary judgment briefing, and after the
4 presentation to Your Honor, we still don't have a definitive
5 definition of what is the common law trademark that's being
6 claimed here. And if a picture is worth a thousand words, then
7 why don't we have images of each and every claim that
8 constitutes the common law trademark you're suing over. We
9 don't have that and we don't have an analysis of confusion for
10 that.

11 Also relevant on this point is, for the plaintiff's
12 game they have -- the only registrations they have are for
13 their word marks other than for Mr. Money Bags. They don't
14 have registrations for their artwork. They don't have
15 copyright registrations for their artwork.

16 But Castle Hill, on the other hand, does have. Castle
17 Hill has copyright registrations for its artwork and it also
18 has trademark registrations for its games. Castle Hill's
19 trademark registrations come with a presumption, too, and the
20 Castle Hill presumption should trump the lack of a presumption
21 that comes with a common law claim that doesn't have the
22 benefit of a presumption.

23 A common law is not vetted before the Patent and
24 Trademark Office like the registration that from comes from an
25 application in a granted registration. The Patent and

1 Trademark Office pushes back on marks that it feels are not
2 protectable with something called an "office action," and the
3 registrant or applicant needs to then submit a response to the
4 office action explaining why the mark is registrable and
5 protectable, and only then if they're successful in persuading
6 the PTO does the registration come through. With that
7 registration, you get a legal presumption; without that
8 registration, you don't get a legal presumption.

9 That's what they have here. They have common law
10 marks, no legal presumption. They haven't shown likelihood of
11 confusion. They haven't shown protectable rights. Those
12 common law trademark claims should go. Those common law
13 trademark claims are also encapsulated within the trade dress
14 claims and the trade dress claims should go.

15 The trade dress is not protectable. It's a generic
16 appearance of a classic Vegas slot machine that the plaintiff
17 doesn't own the propriety rights and image to. There are other
18 competitors that make the same sort of slot machine. They
19 don't own that image. They don't own that right. They've
20 never done anything that gives them that right. It is a
21 product, it is not a packaging. They got to show secondary
22 meaning for it to be protectable at all even if it is
23 protectable, even if it's consistent.

24 That's all we have.

25 THE COURT: Thank you. Trade secrets.

1 MR. ANTONELLI: Thank you, Your Honor. As the
2 court's aware, a significant portion of defendants' motion for
3 summary judgment on the trade secrets claim, there's
4 significant crossover with the issues we discussed earlier in
5 the context of the motion for partial summary judgment so I'm
6 not going to rehash all that. Other than to say that we think
7 that the evidence is clear in our favor on that point on the --
8 certainly as to the bingo card generation algorithm.

9 To address two other what I think are interrelated
10 issues with respect to the trade secrets, one was a question
11 you were asking Mr. Gill earlier with respect to displacement
12 and the displacement argument. And I agree with the court's
13 questioning that to the extent VGT asserts confidential
14 business information claims, that would be almost
15 lesser-includes for their trade secrets.

16 So if it turns out that something they allege to be a
17 trade secret, it turns out it doesn't meet that trade secret
18 standard, could it nevertheless be confidential business
19 information? From a theoretical legal perspective, I think the
20 answer is yes. I don't know that that could or will play out
21 practically speaking with our facts. But to answer the court's
22 legal question there, I think the answer is yes.

23 The issue we have here is one where, as Mr. Gill
24 touched on, we asked VGT a series of interrogatories, one of
25 which asked them to describe all of the facts in evidence in

1 support of their trade secrets and how we had misappropriated
2 those, or allegedly misappropriated those. VGT provided a
3 lengthy description, not necessarily of what they allege had
4 been misappropriated, but rather a list of trade secrets they
5 say they own. That has narrowed somewhat over time but remains
6 a little broad.

7 But then separately we asked a second interrogatory
8 with respect to the confidential business information claim,
9 where we basically said, describe that claim to us, identify
10 any confidential business information, and they completely
11 failed to do so. What they did was they said, see our response
12 to the trade secrets allegations.

13 So from our perspective, perhaps VGT can maintain its
14 confidential business information claim, but VGT has not
15 identified any confidential business information separate and
16 apart from its alleged trade secrets. I think that's an
17 important point as we start to narrow the issues as we head
18 towards trial.

19 And related to that issue, Your Honor, is this -- what
20 we refer to as the "catchall category" for VGT's trade secrets
21 with respect to know-how or alleged negative know-how. And,
22 again, as I mentioned a minute ago, VGT's response to
23 interrogatories and description of its trade secrets identified
24 approximately 40 or so alleged trade secrets. Many of those
25 trade secrets were categories of information and it spanned a

1 couple dozen pages. We attached their interrogatory responses,
2 the most recent amendments to their interrogatory responses, as
3 Exhibit 82 to our motion for summary judgment.

4 As we stand here today, what we understand the alleged
5 trade secrets to be are the bingo card generation algorithm,
6 the uniqueness testing algorithm, and then the third category
7 of know-how. The problem with that third category is that it's
8 been amorphous and undefined throughout the case. And
9 essentially, from our perspective, what VGT's attempting to do
10 through that know-how allegation is something that Oklahoma law
11 would not otherwise allow them to do, which is essentially
12 impose lifelong noncompete agreements with their former
13 employees. Under VGT's view of how know-how and negative
14 know-how works, I don't think an employee could ever work in
15 the Class II gaming space had that employee worked for VGT at
16 some point in time.

17 So I think it's really important again as we begin to
18 narrow the issues for trial to hear from VGT specifically what
19 the trade secrets and know-how issues that they believe remain
20 at issue are. Because, again, from our perspective, the trade
21 secrets are bingo card generation, uniqueness testing, and then
22 within the know-how category I think there's only three.

23 They relate, number one, to the concept of [REDACTED].
24 VGT essentially says, we designed our games with different
25 [REDACTED] than theirs, but we only did that because we

1 understood that the casinos didn't like [REDACTED].

2 The second issue is with respect to avoiding [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED].

6 And then finally, an issue of using these [REDACTED]

7 [REDACTED].

8 So as we understand it, those are the only know-how
9 issues and there's nothing else. But with respect to Castle
10 Hill's affirmative motion for summary judgment, we think that
11 those know-how categories remain undefined and, again,
12 amorphous and really need to be viewed both in light of
13 Oklahoma's forbidding noncompete agreements; and then
14 separately, balancing the employees' abilities to go on and use
15 the knowledge, skill, and experience that they develop in Class
16 II gaming to work at other Class II gaming companies. That's
17 something that the employees need to be able to do.

18 So if the court has any specific questions, we'd be
19 happy to address them.

20 THE COURT: You say Oklahoma law forbidding
21 noncompete. I don't believe that's the law. I think they're
22 constrained; correct?

23 MR. ANTONELLI: That's correct, Your Honor.

24 THE COURT: All right. Let me see if I have any
25 other questions of you. I don't believe so. All right. Thank

1 you.

2 MR. ANTONELLI: Thank you, Your Honor.

3 THE COURT: And VGT. Mr. Swanson.

4 MR. SWANSON: Thank you, Your Honor. So I won't go
5 through the presentation, instead I'll just focus on responding
6 to Mr. Antonelli, although if I could just put up the
7 presentation here.

8 I will just note Castle Hill's brief in support of its
9 summary judgment motion on the trade secrets and confidential
10 information claim, it's short and we submit that they've not
11 even met their initial burden as a summary judgment movant of
12 identifying material facts that are not in dispute. They just
13 kind of said that there's nothing to these claims; therefore,
14 we're entitled to summary judgment. We don't think -- we don't
15 think that's sufficient and is reason alone to deny the motion.

16 Nevertheless, one problem with that is it sort of
17 effectively requires us to put on our entire trade secret case
18 in response, and we did nevertheless submit quite a bit of
19 evidence in response to their motion, although not necessarily
20 everything that we would put on at trial.

21 In the slides, we've just highlighted some of the
22 evidence, substantial evidence, here showing that there are
23 genuine issues of fact on the two principle elements of the
24 trade secret claims. This is for the bingo card algorithm -- I
25 won't walk through all of this but just to show the court --

1 and the unique testing algorithm -- again, substantial evidence
2 on both elements of the claim -- and on the know-how. There's
3 a lot of evidence there. And, again, this is not -- this is
4 not everything but there's more than enough evidence here to
5 warrant a trial.

6 THE COURT: Well, let me ask then: With regard to
7 know-how, Mr. Antonelli outlined three areas that Castle Hill
8 understands to be the know-how claims of VGT: [REDACTED]

9 [REDACTED].
10 We are approaching trial and I do think it's incumbent
11 upon the plaintiff to specify if there are any further know-how
12 claims.

13 MR. SWANSON: Yes, Your Honor. And those are what I
14 would say are the three principle trade secrets within the
15 know-how bucket. There's other confidential information that
16 may not rise to the level of trade secrets but would be subject
17 to the Oklahoma common law claim for misappropriation of
18 confidential business information. This is set forth in
19 Mr. Friedman's declaration as well as other evidence that we
20 cited in our opposition.

21 One example of this would be the [REDACTED]
22 [REDACTED]
23 [REDACTED]. Another example of this that we cited was Castle
24 Hill used its knowledge of VGT's experimentation with an [REDACTED]
25 [REDACTED] feature in its games, and they decided not to pursue that

1 because they realize -- they knew from their time at VGT that
2 there were issues with that and --

3 THE COURT: Negative know-how?

4 MR. SWANSON: That one's a negative know-how, yes.
5 Yes, Your Honor.

6 THE COURT: All right. But is there anywhere a list
7 of these things that you contend constitute negative know-how
8 or know-how in addition to what you say are the principle trade
9 secrets within the know-how bucket?

10 MR. SWANSON: Yes, Your Honor. I mean, I think that
11 list is set forth in Mr. Friedman's declaration as well as in
12 his expert reports and our interrogatory responses.

13 THE COURT: Mr. Friedman's declaration -- and I
14 think I've read three of them -- gets rather lengthy.

15 MR. SWANSON: Yes. Yes, Your Honor. That's in part
16 because candidly there was a lot of use of VGT information.
17 This was pretty pervasive, that they were frequently discussing
18 issues that they encountered at VGT and discussing that while
19 at Castle Hill. So there's quite a bit of references to VGT
20 information throughout the record.

21 THE COURT: Well, I've got to pin you down.

22 MR. SWANSON: Yes.

23 THE COURT: And it's not my job; it's yours.
24 Frankly, I don't think Mr. Friedman -- I forget how many
25 paragraphs he had in that longest declaration but it was

1 lengthy. He did a pretty good job of describing to a novice
2 like myself what he was trying to communicate but that's a long
3 list and we -- for all of us, we've got to pin down what these
4 know-how claims are.

5 MR. SWANSON: Yes, Your Honor.

6 THE COURT: So you say among these are [REDACTED]
7 [REDACTED]. I saw a reference to the [REDACTED] and I saw
8 a reference to the specific negative know-how that you had
9 mentioned.

10 But where are we to derive these know-how claims other
11 than trying to pick through Friedman's declaration?

12 MR. SWANSON: Well, again, Your Honor, I mean, I
13 think his declaration, you know, identifies the specific
14 information that he's relying on to form his opinion that they
15 used confidential information. I believe this was also set
16 forth -- I know it was set forth in our interrogatory responses
17 as well.

18 So, I mean, it's -- you know, there are different ways
19 of, you know, listing it and, you know, certainly we could, you
20 know, put together a, you know, enumerated list, if that's
21 helpful for the court.

22 THE COURT: Well, as I sit here, I mean, we're at
23 summary judgment and we really ought to all know what those
24 know-how claims are and they ought to be listed. So I don't
25 want to give you an opportunity here, frankly, to list things

1 that haven't been clear and might reasonably generate another
2 round of summary judgment. I'm not going to allow it. I've
3 got other cases that I've got to deal with and, frankly, this
4 case is fairly weighty and has taken a lot of resources.

5 MR. SWANSON: Understood, Your Honor. Again, I
6 think this is all in our interrogatory responses and
7 Mr. Friedman's reports. I don't think the specific issues here
8 are a surprise to Castle Hill.

9 THE COURT: Well, let me just ask: With regard to
10 interrogatory responses, Mr. Antonelli, did you specifically
11 request and receive a response to what are the plaintiff's
12 know-how claims?

13 MR. ANTONELLI: We did not ask for specific know-how
14 claims, in large part because neither the complaint nor the
15 amended complaint makes any mention of know-how or alleged
16 negative know-how, no mention of a [REDACTED]. So no, we
17 did not ask a specific interrogatory on that.

18 We did ask for a specific interrogatory on, "State all
19 facts supporting your claim for misappropriation of
20 confidential business information asserted in the complaint."
21 It goes on to request the specificity, each piece of
22 information, how they alleged it was misappropriated, who they
23 say misappropriated it. It's interrogatory No. 5 in VGT's
24 fourth amended response to Castle Hill's interrogatories. It
25 appears on page 155 of the document.

1 And VGT's response was to state some objections and
2 then to incorporate by reference its response to interrogatory
3 No. 34. They later amended it to say that for avoidance of
4 doubt, they incorporate by reference its first, second, third,
5 and any future supplemental response to interrogatory No. 4.
6 Interrogatory No. 4 asked specifically about trade secrets.

7 So I'm trying to understand Mr. Swanson's contention
8 that there is potentially know-how that is separate and apart
9 from the trade secrets or it doesn't rise to the level of a
10 trade secret. That certainly has not been VGT's contention
11 thus far. VGT alleges a lot of things in their interrogatory
12 response. But as the court noted -- I mean, it's well over a
13 hundred pages -- and as the court noted, we're only a couple
14 months out from trial and we can't just list off that these are
15 the following five things of know-how that are at issue. That
16 was one of the primary purposes for our motion.

17 THE COURT: All right. Is this interrogatory
18 response and any supplementary interrogatory responses to
19 interrogatory No. 4, is that amongst the filings before the
20 court on summary judgment?

21 MR. ANTONELLI: Yes, Your Honor. I know that -- I
22 know that Castle Hill included VGT's interrogatory responses,
23 the fourth amended, which was the most recent amendment.

24 THE COURT: Is that 82?

25 MR. ANTONELLI: That was Exhibit 82 yes, Your Honor.

1 THE COURT: All right.

2 MR. ANTONELLI: And VGT may have included it in
3 theirs as well.

4 THE COURT: And, Mr. Swanson, if I were to look at
5 Exhibit 82 and interrogatory response No. 4, is that going to
6 set forth some of these know-how claims?

7 MR. SWANSON: Yes, Your Honor. I believe that
8 should have everything. What we did is we responded to their
9 trade secret interrogatory and set forth all of the
10 information, recognizing that the confidential business
11 information is subsumed within the trade secret claims.

12 I would also point Your Honor to paragraph 50 of
13 Mr. Friedman's declaration as one place where he lists several
14 of these items, including the [REDACTED], including the
15 [REDACTED] issue that I mentioned, VGT's investigation of using
16 [REDACTED], and a couple of other items. And so, you know, I
17 think the specifics are in both places.

18 THE COURT: And which declaration of the three?

19 MR. SWANSON: Yes. That's the declaration submitted
20 in opposition to Castle Hill's motion so that would be the
21 second Friedman declaration.

22 THE COURT: So that's in opposition to Castle Hill's
23 motion for summary judgment?

24 MR. SWANSON: For summary judgment, yes.

25 THE COURT: All right. Anything else for our

1 purposes today?

2 MR. GILL: If you're asking us, Your Honor, I think
3 we've produced everything and had an opportunity to say
4 everything to you today that we needed to say.

5 THE COURT: All right. Thank you. And,
6 Mr. Swanson, if you could give the court a copy of what you
7 were relying on here as to trade secrets, I would very much
8 appreciate it.

9 MR. SWANSON: Sure. It's part of that presentation,
10 Your Honor.

11 THE COURT: Oh, it is?

12 MR. SWANSON: Yeah, yeah, yeah. We put all of that,
13 both the trademark, trade dress, and trade secrets, all
14 together.

15 THE COURT: Okay. Anything else, Mr. Rubman?

16 MR. RUBMAN: No, Your Honor. Thank you.

17 THE COURT: Thank you very much. Hope you all make
18 your flights. Thank you.

19 *(The proceedings were concluded)*

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C E R T I F I C A T E

I, Brian P. Neil, a Certified Court Reporter for the Northern District of Oklahoma, do hereby certify that the foregoing is a true and accurate transcription of my stenographic notes and is a true record of the proceedings held in above-captioned case.

I further certify that I am not employed by or related to any party to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

In witness whereof, I have hereunto set my hand this 17th day of June 2019.

s/ Brian P. Neil

*Brian P. Neil, RMR-CRR
United States Court Reporter*